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Plant Breeder's Rights and Contract Growing in the Pasture Seeds Industry

A Market in Transition

by Rocque Reynolds

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Foreword

Plant breeder's rights (PBR) were introduced into Australia twenty years ago. In that time, the structure of the pasture seeds industry has been transformed. If the separation of breeding from farming marked the first step in the development of a modern, rationalised and commercial agricultural industry, the separation of farming and marketing which has taken place in the pasture seeds industry in the past twenty years marks the second, and yet to be completed, step in this history.

A crucial element of this transformation has been the expansion of contract growing arrangements in the industry whereby specialist growers, in partnership with specialist marketing companies or breeder/marketers, provide high quality, standardised seed for modern seed distribution networks.

This report explores the relationship between intellectual property rights and the growth of contract growing; the role which growing contracts play in the management of intellectual property rights; the results of a survey of pasture seed growers which examined their attitudes to contract growing, and a legal analysis of growing contracts to determine what sort of relationship they are creating between growers and seed marketing companies.

This research marks a breakthrough in legal research into plant breeder's rights and intellectual property in the plant breeding industries. Until now legal research has focussed on whether the introduction of PBR has led to the development of a privatised plant breeding industry and whether or not it is desirable to commodify parts of life. In this research however, the focus shifts from breeders to growers; and from plants to the market in which plants are traded.

The results of this research will be valuable for all stakeholders in the pasture seeds industry who wish to understand more fully how intellectual property rights shape their industry and commercial relationships. It sheds light on contract growing and the role it plays in the management of intellectual property rights and it will provide guidance to industry bodies and government departments who are grappling with issues of PBR enforcement, whether or not a standard growing contract should be developed and whether protective legislation is needed for contract production in the agricultural industries.

This report, an addition to RIRDC's diverse range of over 1600 research publications, forms part of our Pasture Seed R & D Program which aims to enhance and foster innovative rural industries through targeted investment in research and development and our Global Competitiveness Program R&D program, which aims to enhance efficiency and sustainability of agriculture by research into trade and environmental options to improve profitability while safeguarding future agricultural production potential.

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Peter O'Brien
Managing Director
Rural Industries Research and Development Corporation

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The Steering Committee for this project gave guidance and advice on a huge range of issues from survey design to the finer points of plant breeding. Thank you for everything. The members of the Steering Committee are:

- Mr Tim Schultz who is the South Australian grower representative on the Grains Council of Australia Seeds Committee, a member of the RIRDC Pasture Seed Committee, and the current Chairman of the South Australian Farmers Federation Seeds Committee;

- Mr Hugh Roberts who is the NSW grower representative on the Grains Council of Australia Seeds Committee, a past member of the RIRDC Pasture Seeds Committee and a member of the Board of the Australian Seeds Authority (ASA);

- Dr Ross Downes, the Director Research and Plant Breeding at Seed Genetics Australia; and

- Professor Paul Martin, Director of the Centre for Agriculture and Law at the University of New England.

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And thank you to Ms Jennifer Cornwall who wrote an engaging and thoughtful history of the pasture seeds industry in Australia. Her history formed the background of this report and I hope will be published separately in the future.

Associate Professor Rocque Reynolds
August 2007

Abbreviations

ACIP	**Advisory Council on Intellectual Property**
AFI	**Australian Farm Institute**
AFP	**Australian Federal Police**
APAC	**University of Tennessee Agricultural Policy Advisory Center**
ASA	**Australian Seeds Authority Ltd**
ASF	**Australian Seed Federation**
CORI	**University of Missouri Contracting and Organizations Research Institute**
(Cth)	**Commonwealth**
DPP	**Director of Public Prosecutions**
FLAG	**Farmers' Legal Action Group**
IP	**Intellectual Property**
ISF	**International Seed Federation**
OECD	**Organisation for Economic Co-operation and Development**
PBR	**Plant Breeder's Rights**
PBR Act	**Plant Breeder's Rights Act (Cth) 1994**
PVR	**Plant Variety Rights**
PVR Act	**Plant Variety Rights Act (Cth) 1987**
RAFI-USA	**Rural Advancement Foundation International – USA**
UPOV Convention	**International Convention for the Protection of New Varieties of Plants 1961.**

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Executive Summary

What the report is about
This report examines the transformation of the Australian pasture seeds industry over the past twenty years from an industry based on grower/marketers to an industry characterised by specialist marketing companies, specialised growers often growing under contract, and public breeding institutions working in a new commercial environment.

This transformation has been shaped by the introduction into Australia of plant breeder's rights (PBR) in 1987. The PBR Act allowed breeders to sell or licence their exclusive rights to deal with new plant varieties and encouraged the rise of specialist marketing companies to exploit these rights. In turn, the new specialist marketing companies have relied on specialist growers to grow seed under contract for their large modern distribution networks.

The report examines the relationship between contract growing and plant breeder's rights; the attitude of growers to contract growing; and the legal status of the growing contracts.

Although the report notes that there are significant drafting problems with contracts in the pasture seeds industry, as well as problems with the enforcement of PBR, the report concludes that the relationship between pasture seed growers and seed companies today is a strong one, based on joint interests and trust. The report found no evidence of the types of oppressive and unfair conduct which has been associated with contract farming in some of the international literature.

Who is the report targeted at?
The report is concerned with growers' experiences of contract growing in the pasture seeds industry and the impact of PBR on them. However, the results of the research conducted for this report will be valuable for all stakeholders in the pasture seeds industry who wish to understand more fully how intellectual property rights shape their industry and commercial relationships and the role of contract growing in the management of intellectual property rights. The report will provide guidance to industry bodies and government departments who are grappling with issues of PBR enforcement, whether or not a standard growing contract should be developed and whether protective legislation is needed for contract production in the agricultural industries.

Background
The research grew out of a paper presented at the 2003 Agribusiness Conference which looked at strategies for managing PBR. It considered cascading royalties whereby breeders would seek royalty payments not just from growers but also from seed conditioners, retailers, exporters and storage facilities. It considered how end point royalties were being introduced and urged conference participants to look to the *Copyright Act* (Cth) 1968 as a possible template for the future management of PBR. On the basis of this paper and the author's past work in managing intellectual property rights the Rural Industries Research and Development Corporation provided funding to consider how intellectual property was being managed in the pasture seeds industry.

Aims/Objectives
The aim of the report is to examine the relationship between the introduction of plant breeder's rights and the growth of contract growing in the pasture seeds industry; to consider the role of contract growing in managing intellectual property in the pasture seeds industry and to assess growing contracts.

Methods used
The research was conducted in four stages. In the first stage industry leaders, growers and breeders were consulted and asked to identify the issues which they believed were issues of concern for growers, seed breeders and seed companies in relation to managing intellectual property in the pasture seeds industry. At this stage it emerged that contract growing was a major concern for the industry.

A literature review of research related to contract farming constituted the second stage of the research program. It emerged that there had been considerable economic and legal research into contract farming at an international level and some economic analysis of contract farming in Australia, including a little in relation to pasture seed growing. No matter what industry was being researched in relation to contract farming, the issues identified as issues of concern were very similar.

In the third stage of the research an attitudinal survey of pasture seed growers in Australia was conducted which investigated grower attitudes to identified issues of concern and asked them to identify any new issues. It was at this stage that growers identified marketing and access to varieties as the most important issues related to the introduction of PBR. These issues had not been identified previously in the literature.

In the fourth stage the legal structure of the *Plant Breeder's Rights Act* (Cth) 1994 (PBR Act) and the history of PBR both in Australia and overseas was analysed in the light of the new issues raised by pasture seed growers. It was concluded that growers had identified a significant feature of the impact of PBR in Australia which had previously not been fully investigated, although it had been hinted at.

Finally, a legal analysis of twenty growing contracts used in the pasture seeds industry was conducted to assess them against the concerns raised in relation to contact growing which had been identified in the first stage of the research.

Results/Key findings

Relationship between introduction of plant breeder's rights and the growth of contract growing in the pasture seeds industry
When the *Plant Breeder's Rights Act (Cth)* came into effect in 1987 it created out of nothing a brand new commodity, which was the exclusive right to deal with a new plant variety.

As the report shows, the effects of this change were immense. Firstly, it allowed public breeding institutions to commercialise their operations by selling or licensing the right to deal with their seed.

This led to the development of specialist marketing companies who were neither breeders nor growers and, in turn, to the transformation of the old grower /marketer in the pasture seeds industry into a specialist grower who produced seed under contract for the marketing company.

The growth of contract growing in the pasture seeds industry, therefore, is not a direct result of the introduction of plant breeder's rights but is the tool used by the new specialist marketing companies to manage the supply and quality of seeds for their large, modern distribution networks.

If the separation of breeding from farming was the first stage of the development of the modern pasture seeds industry in Australia, the separation of marketing from growing marks the second, and still to be completed, step.

Finally, although it had been expected that the introduction of PBR would lead to the development of a private Australian plant breeding industry this has not happened in relation to pasture seeds. This report demonstrates that today most of the 200 PBR registered pasture seed varieties are owned by Australian public breeding institutions, followed by overseas privately owned breeding institutions and then, a long way behind are Australian private breeders and overseas public breeders.

The role of growing contracts in managing IP in the pasture seeds industry
The growing contract serves three main purposes in the modern pasture seeds industry. First, like all commercial contracts the contract shares risk between the parties. Second, the contract allows the seed marketing company to set standards to ensure quality, consistency and market supply.

The report identifies another important function of growing contracts between specialist seed marketing companies and growers and that is to limit what the grower may do in relation to seed where the seed company cannot rely on the PBR Act to do this. This may happen because the variety is not registered or because there are problems of enforcement under the PBR Act.

The report identifies a number of enforcement problems including the cost of enforcement; the lack of access to the Federal Magistrate's Court; the lack of standing of PBR licensees such as marketing companies and the difficulty of prosecuting offences under the Act.

Attitudinal survey of growers
The survey of grower attitudes to contract growing made a number of significant findings.

There was a difference in attitude to contract growing between those who grow under contract and those who do not. Of the nine growers who had no contract growing experience each one expressed grave concerns as to the nature of contract growing. Of the ten growers who had experience of growing under contract there was a notable confidence in the nature of the bargain and the effectiveness of the industry.

Those with experience in contract growing rejected any suggestion that they might be victims of unfair contracts in their growing enterprise. They reported that they were equal partners in a growing venture with the seed companies, that they were in a position to negotiate terms with the companies and that companies who didn't do the right thing by growers were unlikely to survive.

Contract growers reported that companies did not unduly interfere with grower decisions. In fact, some growers were concerned that companies lacked the necessary skills to give growing advice because they had become specialist marketers rather than breeders or growers.

The benefits of contract growing as perceived by contract growers were price stability, early payment and being released from the responsibility of marketing. The disadvantages were primarily related to the fact that contracts were for limited tonnage and the grower did not necessarily benefit from a good crop.

Growers rarely sought legal advice on the contracts. Despite this, the majority of contract growers were happy with the terms of their contracts because they had negotiated them individually or were able to negotiate a solution if a problem arose, especially in relation to excess and sub standard seed. The timeliness of deliveries (especially from New Zealand) and labelling were identified as two of the biggest problems in the contract relationship.

Legal analysis of contracts
This general grower satisfaction with contract terms was in sharp contrast to the legal analysis of the contract which found that the contracts, whilst not being oppressive, were poorly drafted, varied greatly from company to company and were very confused about the legal relationships established under the contract. Variation is not a problem in itself, however, in an industry where growers (and sometimes even the seed companies) do not seek legal advice on contract drafting the lack of an industry standard is of concern.

The report does not believe that further education will solve these problems and instead asks whether protective legislation or the introduction of a standard contract would be a better way to address this problem.

Implications for relevant stakeholders

The report has important implications for relevant stakeholders insofar as it explains clearly the relationship between contract growing and PBR and concludes that, at least amongst the successful growers approached in the survey who have experience of contact growing, there is some confidence in the effectiveness and fairness of their contract growing arrangements and a rejection of the more extravagant concerns about contract farming generally

Chapter One

PBR: The Transformation of a Market

Ornithopus - Grasslands Koha[1]

Introduction

This research grew out of a paper presented at the 2003 Agribusiness Conference which looked at strategies for managing plant breeder's rights (PBR). It considered cascading royalties whereby breeders would seek royalty payments not just from growers but also from seed conditioners, retailers, exporters and storage facilities. It considered how end point royalties were being introduced and urged conference participants to look to the *Copyright Act* (Cth) 1968 as a possible template for the future management of PBR. On the basis of this paper and my past work in managing intellectual property rights the Rural Industries Research and Development Corporation provided funding to consider how intellectual property was being managed in the pasture seeds industry. The research was to focus on the impact of plant breeder's rights on growers.

From the very beginning the research took a very clear direction. From discussions with industry leaders, growers, breeders and the Steering Committee it quickly emerged that, from the grower's point of view, the most important issue to consider in relation to managing plant breeder's rights in the pasture seeds industry was contract growing.

From a legal point of view it was not immediately obvious why PBR should be related to contract growing. Traditionally, lawyers have argued that one of the benefits of introducing statutes to protect intellectual property rights is that the intellectual property owner does not have to rely on contract to enforce his or her rights but can instead rely on statute. In other words, under statute, intellectual property is protected against the wrong doing of even a complete stranger. Furthermore, the history of

[1] Images appear courtesy of IP Australia and remain the property of the Australian Government. IP Australia is the government agency responsible for the administration of plant breeder's rights in Australia www.ipaustralia.gov.au.

modern agribusiness suggests that there has been a general trend towards contract growing in certain agricultural sectors and that this was occurring whether or not intellectual property rights subsisted in the product being produced.[2]

The project team decided to investigate these concerns further in order to try to understand how plant breeder's rights and contact growing were linked from the growers' point of view. The results of this research have been surprising. What emerged was that:

- the introduction of PBR was related to increased specialisation in the pasture seeds industry whereby the institutions of marketing and growing are becoming separated;
- this new specialised marketing sector relies on contract growing to ensure the quality, consistency and quantity of seed needed to supply modern seed distribution networks;
- some growers are concerned that the emerging institutional arrangement is not economically sustainable; and
- an individual grower's decision to grow under contract is determined primarily by whether or not they can access and market the desired variety in any other way.

Rather than contract growing being separate from the concerns of PBR as we had initially thought, our research demonstrated that contract growing was the mechanism through which specialist marketers, who had emerged as a result of the introduction of PBR, managed their business.

Methodology

The research has been conducted in four stages. In the first stage industry leaders, growers and breeders were consulted and asked to identify the issues which they believed were issues of concern for growers, seed breeders and seed companies in relation to managing intellectual property in the pasture seeds industry. It was at this stage that the issue of contract growing emerged.

A literature review of research related to contract farming constituted the second stage of the research program. It emerged that there had been considerable economic and legal research into contract farming at an international level and some economic analysis of contract farming in Australia, including a little in relation to pasture seed growing. The important thing to emerge from this literature review was that, no matter what industry was being researched in relation to contract farming, the issues identified as issues of concern were very similar.

In the third stage of the research an attitudinal survey of pasture seed growers in Australia was conducted which investigated grower attitudes to identified issues of concern and asked them to identify any new issues. It was at this stage that growers identified marketing and access to varieties as the most important issues related to the introduction of PBR. These were not issue previously identified in the literature.

In the fourth stage we analysed the legal structure of the *Plant Breeder's Rights Act* (Cth) 1994 (PBR Act) and the history of PBR both in Australia and overseas in the light of the new issues raised by pasture seed growers. It was at this point that we concluded that growers had identified a significant feature of the impact of PBR in Australia which had previously not been fully investigated, although it had been hinted at.[3]

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[2] See C Eaton and A Shepherd, *Contract Farming: Partnerships for Growth*, United Nations Food and Agriculture Organisation, 2001 and the Australian Farm Institute, *Vertical Contracting in Agriculture: Current Trends and Implications for Farmers and Policy-Makers*, April 2006 for recent examples.

[3] See Ross Kingwell's excellent "Institutional Change and Plant Variety Provisions in Australia", *Australasian Agribusiness Review* Vol 13 2005 p 12ff.

Finally, we conducted a legal analysis of twenty growing contracts used in the pasture seeds industry to assess them against the concerns raised in relation to contact growing which had been identified in the first stage of the research.

The Structure of this Report

This chapter will consider the historical, legal and institutional context in which plant breeder's rights and growing contracts have emerged. We will demonstrate that in Australia the impact of PBR has been quite distinctive insofar as it has led to the separation of growing and marketing in the pasture seeds industry and that this new marketing sector relies in turn on contract growing. Although this institutional change is not occurring evenly throughout Australia there are indications that, as suitable public varieties become less readily available, contract growing will become the normal way of producing seed and the separation of growing and marketing will become more complete.

Although contract growing does not depend on the existence of intellectual property rights, the effective management of intellectual property rights may depend on contract growing. In Chapter Two, "Managing IP: the Legal Framework" the different types of contracts used in the pasture seeds industry for managing PBR are identified; the importance of growing contracts in managing PBR will be explained; and the particular problems of enforcing PBR will be identified as one of the reasons for the continuing use of contact growing in the pasture seeds industry. The chapter will conclude with a brief consideration of how other forms of intellectual property, including patents and trade marks, are managed in the pasture seeds industry.

Having understood the role of growing contracts in the pasture seeds industry, Chapter Three, "Grower Attitudes to Contract Growing", will analyse the results of the grower attitudinal survey. Grower attitudes will be compared against attitudes and concerns identified in the literature in relation to contract growing including the question of whether growing contracts affect grower autonomy and entrepreneurial capacity and whether issues of surplus seed, substandard seed, closed loop growing and risk sharing are dealt with fairly between the parties. The chapter will conclude that on the whole, growers with contract experience support the institution of contract growing and believe they have maintained autonomy and entrepreneurial capacity. On the other hand, growers without contract experience have very negative attitudes towards the institution of contract growing.

Finally, Chapter Four "Legal Analysis of Contract Growing" takes a different approach to analysing growing contacts. Rather than relying on grower attitudes towards growing contracts this chapter examines them from a purely legal point of view. The chapter concludes that the legal status of the contracts is confused, that the terms vary and are difficult to interpret and that, for these reasons, it would be highly desirable that a standard growing contract be adopted by the industry following suitable consultation.

Twenty years of PBR: from seed dealer to specialist grower

One of the exciting reasons for conducting research into plant breeder's rights is that they are so new. Copyright has been around for about 300 years.[4] Patents emerged in Britain in the late 15th century but had been around in other parts of Europe since the Middle Ages. Trade marks have been protected in some form since market economies emerged. Although a very narrow plant patent for asexually reproduced plants was introduced in the United States in 1930[5] it was not until the mid 1960s in the

[4] The first copyright Act, the *Statute of Anne*, was passed in 1709 although some commentators argue that a form of common law copyright existed before then.
[5] US *Plant Patent Act* (1930).

United Kingdom,[6] 1970 in the United States[7] and 1987 in Australia[8] that modern plant breeder's rights were introduced which included protection for sexually reproduced plants.[9]

Whilst it requires a nearly impossible act of imagination to think of the publishing or music industries without copyright or a pharmaceutical industry without patent, it really doesn't require an act of imagination at all to think about a plant breeding industry or a pasture seeds industry without plant breeder's rights. Experienced breeders and growers can still tell us what the world was like before the introduction of plant breeder's rights and are certainly happy to do so.

As part of our attitudinal survey we therefore asked growers how they thought the industry had changed over the past twenty years.[10] The responses were striking and overwhelmingly growers expressed concern that there was increasing specialisation in the industry; that there were fewer growers, that there was a greater number of varieties grown and that the marketing of pasture seeds had changed. Whilst in the past growers marketed their own seed either personally or through a seed merchant, today growers were more likely to grow seed under a contractual arrangement with a specialist seed marketing company. Under this contract they were required to return the harvest to the seed company which would market the seed, often under a licensing agreement with the plant breeder. Growers who did not grow under contract continued to market their own seed.

"… under PBR there are a lot more fleas on the dog…with everyone else wanting to make a quid before the people who do all the work get something out of it."

Throughout the survey and in interviews with industry leaders it emerged that there was some disquiet as to whether this new marketing structure was economically sustainable. In the words of one grower, "… under PBR there are a lot more fleas on the dog…with everyone else wanting to make a quid before the people who do all the work get something out of it".[11] This was reflected in the comment of an industry leader: "Someone has to pay for all those young guys driving around the countryside in suits" and of a grower who said that if you grow independently "you don't have to pay all those administration costs that the companies seem to need to run their part of the business."[12]

It is interesting to note that such concerns were raised only by independent growers - those growing under contract did not express similar concerns although it may be that references to the low prices paid by seed companies could be related.

One of the most complex set of attitudes related to grower attitudes to marketing and the impact of contract growing. Some contract growers believed that one of the advantages of contract growing was that they no longer had to market their seed. On the other hand, others missed marketing and expressed some nostalgia for the old days when they did their own.

Throughout the survey, one of the most complex set of attitudes related to grower attitudes to these changes in marketing. Some contract growers believed that one of the advantages of contract growing was that they no longer had to market their seed. On the other hand, some missed marketing and expressed some nostalgia for the old days when they did their own. Non contract growers on the whole still relished marketing and one expressed the opinion that marketing was the best part of the whole enterprise because it takes the grower out into the community and makes the grower aware of

[6] *Plant Varieties and Seeds Act* (UK) 1964.
[7] US *Plant Variety Protection A ct* (1970).
[8] *Plant Variety Act* (Cth) 1987 repealed and replaced by the *Plant Breeder's Rights Act* (Cth) 1995.
[9] These Acts were all designed to meet the requirements of the *International Convention for the Protection of New Varieties of Plants* 1961 (UPOV Convention), revised 1972, 1978 and 1991.
[10] Question 1.
[11] Question 2.
[12] Question 2.

customer demands and needs.[13] Another non contract grower expressed a similar view in this way, "Oh, the benefits are you can chase the market, you wait for the market to rise and so on. You can sell anywhere. The disadvantage of course, if there is a flood in the market you will have to sit and wait to sell your product."[14] It is interesting to compare these sentiments to the comments of a member of a grower co-operative who explained that, when contract growing was first introduced into his grower co-operative, growers were initially given an option as to whether they wanted to market their own seed or return it to the co-op for marketing. Although some growers opted to market their own seed for the first two seasons, by the third season all growers had chosen to leave the marketing to the co-op itself.

The changed relationship to marketing was one of the clearest indicators of the changed role of the grower in the pasture seeds industry and it is intimately linked to the introduction of PBR.

"Oh, the benefits are you can chase the market, you wait for the market to rise and so on. You can sell anywhere. The disadvantage of course, if there is a flood in the market you will have to sit and wait to sell your product."

Quote from non contract grower.

The Impact of PBR and the Emergence of the Specialist Grower

The historical context

In the United States, the separation of breeding, marketing and growing took place as part of the rationalisation and commercialisation of agriculture from the early nineteenth century on. As Dutfield[15] and Fowler[16] have demonstrated, until that time breeding and farming were one activity. Farmer-breeders selected, saved and improved their own seed, and there was no separate and distinct seed marketing industry. As the roles of breeding and farming separated a vibrant private seed breeding and marketing industry developed which pushed for the introduction of plant breeder's rights to support the marketing of their new varieties. It is interesting to note that the introduction of PBR legislation was for a long time rejected by Congress, members of whom distributed seed free of charge to constituents. This had begun as a method to encourage farmer breeding and experimentation in the American frontier but by the 1930s had deteriorated into a mere form of political patronage[17] which was strongly opposed by the plant breeding and marketing industries. Private breeding and marketing interests were therefore the driving force for the introduction of plant breeder's rather than the other way around. As Ross Kingwell puts it:

> *The views of Fowler and Alston and Venner are that strong intellectual property rights in plants, rather than clearly encouraging additional investment in plant breeding, could just be an instrument of marketing, advocated and employed by powerful seed companies.* [18]

The development of the modern pasture seeds industry in Australia has been quite different. Although the same separation of farming and breeding took place in Australia in the nineteenth century, this did not lead to the development of a private seed breeding and marketing industry. Instead, breeding

[13] Question 18.
[14] Question 18.
[15] G Dutfield, *Intellectual Property Rights and the Life Science Industries. A Twentieth Century History*, Ashgate, 2003.
[16] Cary Fowler, Chapter Two "From Seed Saving to Seed Buying: The Rise of Commercial Agriculture and Scientific Plant Breeding in the US, to 1930" in *Unnatural Selection. Technology, Politics and Plant Evolution*
[17] Fowler covers the history of the free distribution of seed inn the United States throughout his text.
[18] Ross Kingwell, "Institutional Change and Plant Variety Provisions in Australia", *Australasian Agribusiness Review* Vol 13 2005 p 12ff, references deleted.

became the purview of public breeding organisations such as state agriculture departments, much of whose research was built on the introduction and adaptation of exotic species to the different climatic and soil conditions of Australia. In NSW, for example, the Department of Agriculture formally began working on pastures in 1913 following the appointment of its first agronomist and from 1917 on seed testing was introduced in each state to ensure the purity and quality of seed.

Whilst this was happening, pasture seed marketing remained firmly with farmers and specialist pasture seed grower-marketers who acquired their seed from public breeding institutions either for free or at a nominal cost and marketed the harvest through their own networks. From 1960 grower co-operatives and pools were formed to rationalise the marketing and stabilise prices for pasture seed. These included the Tasmanian Pasture Seeds Pool which was established in 1960; the South Australian Seed Growers Co-operative established in 1964,[19] and the NSW Kangaroo Valley Perennial Ryegrass Seed Growers Co-operative established in 1967.

It was in this very different institutional arrangement that the call to introduce PBR emerged. US and other overseas seed marketers called for its introduction to protect their seed once it was exported to Australia, and Australian seed producer organisations supported this call because it would provide better access to overseas bred varieties. The governments of the day,[20] on the other hand, supported the introduction of PBR because they believed that it would lead to the development of a private breeding industry in Australia, possibly similar to the US model. These are generally referred to as the twin objectives of breeding and access.

The impact of introducing PBR into this very distinct Australian institutional arrangement of public breeding and grower-marketers was quite different to what either the governments of the day or the seed producer organisations may have expected and it has taken the insights of growers who have experienced this change to bring it to light. To understand how the separation of growing and marketing has been effected by the introduction of PBR it is necessary to understand precisely what the PBR Act did.

What PBR did

When commentators consider the impact of granting intellectual property rights over plants and other living matter they usually focus on the two big issues. First, has the plant breeding industry been privatised as a result of the introduction of plant breeder's rights? And secondly, is it appropriate that the law should allow nature to be commodified in this way?[21]

From the point of view of the pasture seeds industry, neither of these issues is immediately significant. As we shall see, in Australia most pasture seed breeding is still conducted by public breeding institutions. More importantly, the PBR Act did not turn seed into a commodity, it already was one. The father of Matisse (1864–1954) was a seed merchant, Uncle Pumblechook from *Great Expectations* (1837) was a seed merchant and Australian growers were dealing with seed right up until the time that PBR was introduced.

What the PBR Act did was to create a whole new set of commodities in the form of property rights which could be traded just like any other commodity. These new property rights were not in the seed itself (which was already a commodity) but rather resided in the right to reproduce and deal with that seed.

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[19] J Sewell , *Australian Seed Industry History*, Grains Council of Australia, c 1988, p26.

[20] First the coalition conservative governments and then after 1983, the Australian Labor Party.

[21] See M Blakeney, JJ Cohen and S Crespi, "Intellectual property rights and agricultural biotechnology" in JJ Cohen, *Managing Agricultural Biotechnology – addressing research program needs and policy implications*, CAB International, 1999. Alexandra A, *Australian Plant Intellectual Property Law in Context*, Centre for Applied Philosophy and Public Ethics, Working Paper Number 2001/4; PW Heisay, CS Srinivasan and C Thirtle, "Privatization of plant breeding in industrialized countries: causes, consequences and public sector response" in D Byerleee and RG Echevarrfa, *Agricultural Research Policy in an Era of Privatization*, CAB International 2002.

In other words, after the introduction of plant breeder's rights the breeder of a new variety who registered that variety could still sell and deal with the seed as he or she had always done in the past but in addition, the breeder could now also sell or license the exclusive rights to grow and deal with the variety which had been granted under the Act. Instead of having only one thing to sell, the breeder now had a number of valuable commodities. The Act effectively created new commodities out of thin air.

Furthermore, the right of the breeder to be registered on the PBR register is also a form of personal property in its own right. The breeder can assign or transmit this right to someone else (s 25). For this reason the owner of the plant breeder's rights is usually referred to as the "grantee" rather than the "breeder".

The PBR Act effectively created new commodities out of thin air.

In legal terms this means that the property right in the seed, thought of merely as a seed, is separate from and different to the property right in the plant breeder's rights which subsist in that seed. This is explained in the *Plant Breeder's Rights Act* (Cth) 1968 s 20 and s 25.

s 20 ***PBR is personal property and…is capable of assignment, or transmission by will or by operation of law.***

An assignment of PBR does not have effect unless it is in writing signed by, or on behalf of the assignor and assignee.

If a grantee of PBR in a plant variety gives another person a licence in that right, the licence binds every successor in title …to the same extent it was binding on the grantee…

s 25 The right of a breeder … to apply for PBR is personal property and is capable of assignment and transmission by will or operation of law.

An assignment of a right to apply for PBR must be in writing signed by or on behalf of the assignor.

This is best illustrated by thinking about copyright. If I write a play I can sell a copy of the play to my friend to read but I can also sell or licence the right to publish the play, make a film version of the play, or perform the play in public. In fact, I will probably make much more money from selling or licensing these exclusive rights than I will from selling books alone.

Similarly, a person who breeds a new plant variety may simply sell the plants or seeds as a commodity. The amount of money the breeder makes will depend simply on how many seeds or plants he or she can sell. On the other hand, if the breeder has plant breeder's rights then the breeder has something else to deal in. The breeder can sell or license the exclusive rights granted under the PBR Act. For example, the breeder may grant a license to one company to sell the seed in Australia, another to sell the seed in New Zealand. The breeder could grant a license to one company to treat or condition the seed and another license to a company to multiply the seed. In this case, the breeder can maximise profits by encouraging the growth of a much larger distribution network than the breeder could possibly manage alone and at the same time, receive payment for the grant of these licences.

Figure 1

"Mr. Pumblechook" an illustration of the seed merchant by J Clayton Clarke ("Kyd") from Charles Dickens, ***Great Expectations,*** Volume 19 of the Edition de Grande Luxe. Ed. Richard Garnett. London: Merrill and Baker, 1900.
Watercolour; 4.8 x 3 inches
From *The Victorian Web*. http://www.victorianweb.org/. Date viewed. 13 September 2006.

Breeding and Growers

The first and most dramatic impact of this legal revolution was on public breeding institutions. These institutions, which had been relying on ever dwindling public funding, now had a potential new source of revenue. They could sell or license the right to deal with their seed. Once this occurred it was perhaps inevitable that commercial pressures would come to bear on the breeding decisions of the institutions. Instead of focusing research on agreed industry priorities, for example, the institution might instead focus on niche markets which could complete the seed catalogue of a possible marketing licensee. If the public breeder decided to remain its own marketer it might choose to focus on varieties with potentially large volume sales, including export sales, rather than Australian pasture needs. Kingwell has called this "privatisation by stealth."[22] In interviews, some public breeding institutions have indicated a keen awareness of this issue and are developing policies to determine how breeding priorities are set.

The second effect of the introduction of PBR was on growers. Any individual grower or grower co-operative could in theory tender for the right to market a breeder's seed and in some cases this did

[22] Ross Kingwell, "Institutional Change and Plant Variety Provisions in Australia", *Australasian Agribusiness Review* Vol 13 2005 p 12ff.

happen. However, in the process of doing this the very nature of the grower or co-operative was likely to change from that of a grower-marketer to a specialist marketer. For most growers the choice was to become a specialist grower for a specialist seed marketing company which had acquired the right to market the seed or to continue growing and marketing public varieties which were not protected by PBR. In our survey many growers tried to maintain a balance between these two methods of growing. Only one was a member of a grower co-operative which sometimes tendered to market new varieties.

If the separation of breeding from farming was the first stage of the development of the modern pasture seeds industry in Australia, the separation of marketing from growing marks the second, and still to be completed, step

If the separation of breeding from farming was the first stage of the development of the modern pasture seeds industry in Australia, the separation of marketing from growing marks the second, and still to be completed, step.

Contract growing can be seen to be central to this new institutional structure of specialised marketing and growing. Not only does it establish the relationship between the seed company and the grower but it regulates the quality, consistency and quantity of seed needed to supply their modern seed distribution networks. In the next chapter the role of the contract will be considered in more detail.

What happened to privatisation?

Most research into the impact of PBR in Australia has concluded that, at least at a macro level the twin objectives of breeding and access have been achieved. Looking at the PBR register as a whole it has been shown that there have been more than 4000 plants registered under the Act, there has been an increase in private plant breeding in Australia and 60% of the applications for plant breeder's rights come from overseas.[23]

If we take a step closer and examine the PBR register from the point of view of the pasture seeds industry, however, a quite different story emerges:

- there are only just over 200 pasture seeds registered on the PBR. Of these, more than half are owned by public breeding institutions such as the CSIRO, Department of Agriculture in Western Australia or the Japanese Department of Agriculture;

- approximately 60% of the pasture varieties registered on the PBR register are Australian owned and of these, the vast majority are owned by public organisations;

- by comparison, of the 40% of pasture varieties registered in the name of overseas owners, 80% of these are owned by private companies.

In other words, most PBR registered pasture seeds are owned by Australian public breeding institutions, followed by overseas privately owned breeding institutions, then a long way behind are private Australian breeding companies and overseas public breeding institutions. From this point of view one would be tempted to say that in the pasture seeds industry, at least, the objective of promoting a private Australian pasture seeds breeding industry has not been a success.

From this point of view one would be tempted to say that the objective of promoting a private Australian pasture seeds breeding industry has not been a been a success.

[23] See ACIPA, Alexander, Second Reading Speech for the Plant Breeder's rights amendment Bill 2002.

On the other hand, PBR registrations are not the only measure of public and private breeding. Public varieties bred by public breeding institutions in the past still play an important part in the industry and some new varieties are not registered and so the breeder will not be noted on the register. Furthermore, it is not possible to tell whether a variety is publicly or privately bred by considering supplier lists published by various State departments of agriculture because in many cases the supplier is not the a breeder.

In 2002, Smith and Hannay warned that, because pure seed line stocks of public varieties were not being maintained or were difficult to access and because profitable "proprietary" material was more readily accessible, the market demand for older public varieties would diminish.[24] This issue has partly been addressed by the Australian Seeds Authority Ltd which received funding from RIRDC in 2005 to complete a survey of maintainers of Australian pasture plant varieties certified under the OECD Seed Schemes to determine whether or not currently listed varieties remain under active maintenance; to work with maintainers to address deficiencies associated with inadequate maintenance plans; to identify public varieties required for future trade and to establish a process to facilitate the transfer to industry entities of the maintenance responsibility for public varieties needed for future trade but which will not be further maintained by current maintainers. The ASA established the Public Varieties Maintenance Panel in November 2005 to review feedback from industry on the survey and make recommendations on further action to be taken by ASA. This work is ongoing and brings us to the question of access generally.

The changing problem of access

One of the objectives of introducing PBR referred to above was to ensure access to overseas bred varieties of pasture seed. The figures from the PBR register suggest that this has been successful insofar as 40% of the registrations are in the name of overseas companies. The figure many be higher because an overseas breeder may have assigned the right to be entered on the PBR register to an Australian distributor or marketer.

There are, however, questions of access which are only now, after twenty years of PBR, coming to the attention of policy makers and stakeholders as possible issues of concern. The first has already been mentioned. As time goes by access to public varieties may decrease due to market forces and the difficulty of maintaining pure bred line stocks. Similar problems may arise in relation to PBR varieties. There is no guarantee that breeders will maintain pure bred lines after the twenty year PBR period has expired and the variety enters the public domain.

In addition, as property rights in plant varieties and breeding technologies become more widespread and as institutions rely on the protection and management of these property rights for funding then it is likely that access to both plant germplasm and technologies needed for breeding or seed treatment will become more difficult. Not only does this have implications at a global environmental level but it also has significant implications for the future of the plant breeding and treatment industries themselves. The development of the prototype transgenic vitamin A rice, for example, is said to have incorporated technology based on seventy patents with thirty-two different owners.[25] At best, the mobilisation of this amount of intellectual property is a time consuming and expensive exercise in developing licensing and cross licensing agreements. At worst, innovation can be stifled by what is known in the field of patents as "patent gridlock".

[24] P Smith and J Hannay, *Structural Change Affecting the Seed Industry and its Potential Impact on Seed Quality Management Services Provided by PIRSA*, Primary Industries and Resources South Australia, November 2002, p 11.

[25] Example quoted by Ross Kingwell, "Institutional Change and Plant Variety Provisions in Australia", *Australasian Agribusiness Review* Vol 13 2005 p 12ff.

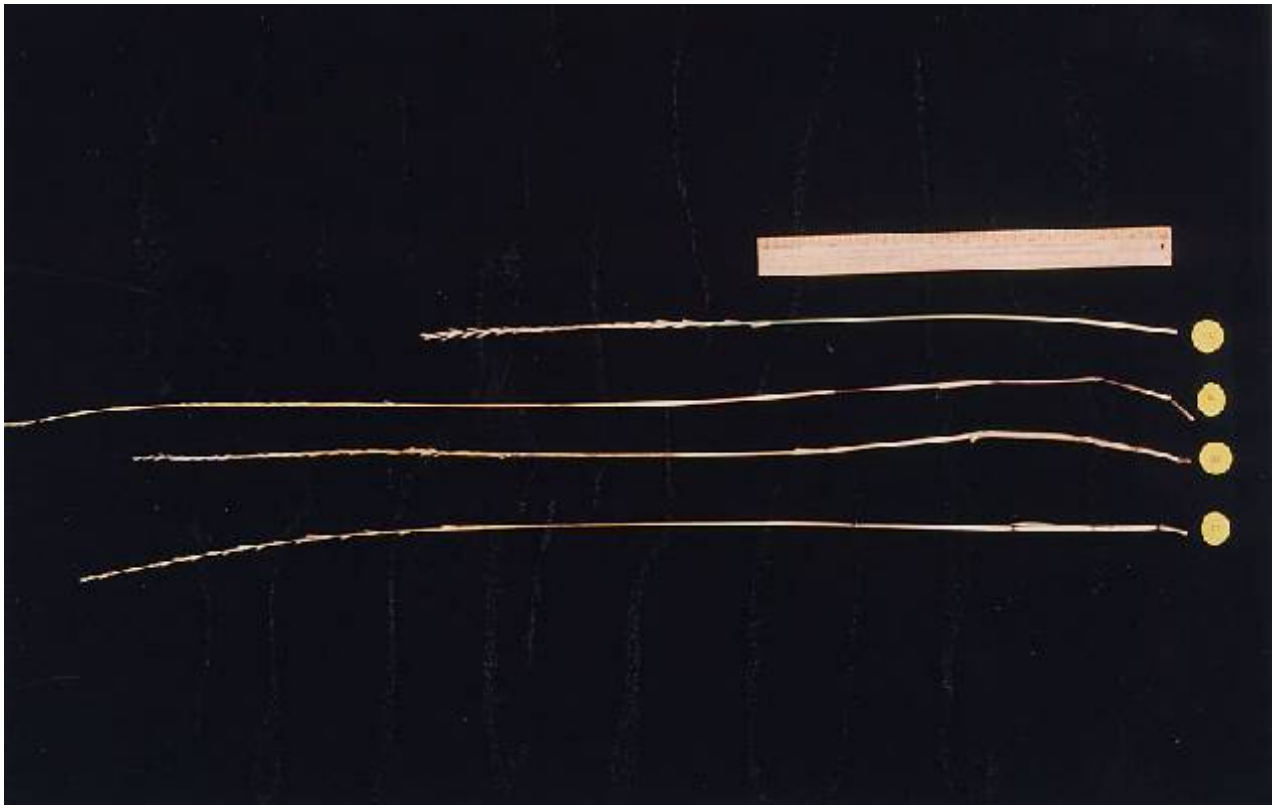
At an international level there is an immense amount of work being done to address these matters and industry bodies will need to draw on significant resources to ensure that the interests of their members are considered. The *Convention on Biological Diversity*; the *International Undertaking on Plant Genetic Resources*, the *International Treaty on Plant Genetic Resources for Food and Agriculture*, the *Trade Related Aspects of Intellectual Property Rights* and the *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* are the main international instruments which address the question of access and technology transfer.

Conclusion

To conclude, the PBR Act created out of nothing a new commodity, which was the exclusive right to deal with a new plant variety. As a result of this, the introduction of PBR into the Australian pasture seeds industry market place has led to the creation of a specialist pasture seed marketing sector and the gradual separation of growing and marketing in the industry. The new marketing system relies on contract growing to supply its needs. Whilst this specialist sector continues alongside the traditional institution of the pasture seed grower-marketer some commentators have identified factors which may lead to the eventual decline of this traditional structure. In the next chapter the role of contract growing in the modern pasture seeds industry will be examined in more detail.

Chapter Two

Managing IP: the Legal Framework



Hybrid ryegrass 'Grasslands Impact' (top) has shorter stems and spikes than 'Geyser (2nd from bottom), Grasslands Manawa (Bottom) and new 31' (2nd from top)[26]

In order to understand the role of contract growing in the modern pasture seeds industry it is necessary to understand how intellectual property rights are managed. This chapter will focus on the management of intellectual property rights created under the PBR Act but will also briefly refer to patent and trade marks which also play their part in the pasture seeds industry.

The Structure of the PBR Act

Rights Created and Granted under the Act

The current *Plant Breeder's Rights Act* (Cth) 1994 (PBR Act) gives the breeder, or a person claiming through the breeder, a right to register a distinct, uniform and stable plant variety which hasn't previously been exploited (which we will refer to as a "new" plant variety) on the Plant Breeder's Rights register. Once registered, the person is known as the grantee and is granted the exclusive rights to produce or reproduce, condition, sell or offer to sell, import or export or stock propagating material of the variety for any of these purposes. These are known as s 11 acts or plant breeder's rights (PBR).

[26] Images appear courtesy of IP Australia and remain the property of the Australian Government. IP Australia is the government agency responsible for the administration of plant breeder's rights in Australia www.ipaustralia.gov.au.

Some of these rights are "exhausted" after the first sale of the propagating harvested material by the grantee. This means that once the seed has been sold to one person, that person or anyone else who acquires the seed from him or her, can do any of the s 11 acts in relation to that seed other than produce, reproduce or export it to a country that does not have PBR protection.

Infringement and Offences Relating to PBR

It is a breach of the grantee's PBR if any person:

- does any of the s 11 acts without the consent of the grantee;
- claims, without consent, the right to do any of the s 11 acts; or
- uses the name of the registered variety in relation to any other plant variety in the same denominational class.[27]

If a person does any of the s 11 acts the grantee may seek an injunction (that is, a court order that stops the person doing that act) or sue the alleged infringer for damages or an account of profits (s 53). This is called a civil action.

In addition, the PBR Act creates two types of offences. These are "infringing offences" and "offences other than infringing offences".

"Infringing offence" are covered by s 74 which provides that it is an offence to do any of the s 11 acts without consent. If found guilty, the person could be fined up to 500 penalty points or $55,000.

Section 75 provides that a person commits an offence other than an infringing offence if the person makes certain false representations about the ownership and effect of plant breeder's rights. If found guilty, the person is liable to be fined 60 penalty points or $660.

Defences and Compulsory Licenses

The Act tries to balance the interests of plant breeders and other stake holders by providing a number of defences to infringement of PBR and by creating two compulsory licensing schemes.

The defences are designed to protect traditional farming, breeding and private usages. Thus, a person does not infringe PBR if the person does a s 11 act:

- privately and for a non-commercial purpose;
- for an experimental purpose; or
- for the purpose of breeding other plants (s16).

Compulsory licenses ensure that the public interest in plant varieties is protected by allowing the public to do certain of the s 11 acts without the permission of the grantee so long as the person pays equitable remuneration to the grantee. If the parties cannot agree on the rate of equitable remuneration then the courts can decide.

The first compulsory licence is dealt with under s 19 of the Act. This section imposes a duty on the grantee to take all reasonable steps to ensure reasonable public access to the plant variety. Reasonable access means making propagating material of reasonable quality available to the public in sufficient quantities to satisfy demand.

If a person believes that the grantee has failed to do this then that person, any time after two years of the grant being made, may apply to the Secretary to issue a compulsory license, on behalf of the grantee, to a person to sell propagating material for the variety or to produce propagating material for

[27] The reference to "class" is an indirect reference to the taxonomic hierarchies under the *International Code of Botanical Nomenclature* and the *International Code of Nomenclature of Cultivated Plants*. See definition of "plant class" in s 3 and the Registrar's duty to keep a list of plant classes in s 61.

sale. The person who makes the application must be a person affected by the grantee's failure to ensure reasonable access.[28] Under s 19(11) the Secretary may certify at the time of granting PBR that the particular plant variety in question has no "direct use as a consumer product". The meaning of this phrase has not been determined within the context of the Act. However, it has been suggested that this provision might effectively be used to prevent public access to inbred lines which have a high commercial but low consumer value.[29]

The second compulsory licensing scheme was introduced under the *Plant Breeder's Rights Amendment Act* (Cth) 2002. Under s 18 any person is allowed to perform a s 11 act in relation to propagating material where that act is necessary to meet the person's obligations under another State, Territory or Commonwealth Act. This section facilitates the operation of compulsory statutory marketing schemes, for example, such as those operating in relation to grains.

Enforcement of PBR

It is not enough that the PBR Act creates certain rights. In order for the Act to be effective it must be possible to protect or enforce those rights. However, enforcement of plant breeder's rights continues to be a problem, not only in the pasture seeds industry but throughout the horticulture and grain industries as well.

We do not know the extent of PBR infringement in the pasture seeds industry and pasture seed growers disagree as to whether it is a serious problem or not. What we do know, however, is that there have been very few court cases relating to the infringement of plant breeder's rights in Australia and none relating to pasture seed despite the fact that the Australian Seed Federation (ASF) launched Operation PBR in 2004 with great hopes of successfully bringing infringers to task through using the services of a specialist private investigation agency.

The Government's Advisory Council on Intellectual Property (ACIP) is currently conducting an investigation into the problem of enforcement of PBR and considering possible strategies to assist Australian PBR owners to effectively enforce their rights. ACIP released an Issues Paper in March 2007 and will be holding consultations during the year.

There are two avenues for enforcement of plant breeder's rights under the Act. These are to take a civil action for infringement or to seek criminal prosecution of the alleged offender…Each of these approaches has particular problems.

As indicated above, there are two avenues for enforcement of plant breeder's rights under the Act. The first is to take a civil action for infringement against a person who does one of the s 11 acts without the consent of the grantee (s 54). The other is to prosecute that person for committing an offence under s 74 or s 75 of the Act. In the case of a civil action, the plaintiff may receive damages from the defendant but in a prosecution, the most that can be expected is that the defendant pays a fine to the government. Each of these approaches has particular problems.

[28] There are detailed procedural provisions for the Secretary to follow in establishing this licensing scheme including a requirement that the Secretary invite interested parties to apply for the grant of such a licence. See *Plant Breeder's Right's Act* 1994 (Cth) s 19(3) – s 19(10).
[29] LexisNexis, *Halsbury's Laws of Australia*, Intellectual Property [210-7015] footnote 3.

Infringement Proceedings under the PBR Act

The cost of taking a civil action can be prohibitive. Although we do not have comparable figures for PBR, the Australian Federation of Intellectual Property Attorneys (FICPI) has estimated that a simple patent infringement matter in 2003 in Australia would cost not less than $200,000.[30] Part of the reason for this cost is that actions can only be commenced in the Federal Court. As part of its review into enforcement of PBR, ACIP has been asked to investigate whether the Federal Magistrates Court should also have jurisdiction to determine PBR matters. Taking action in the Federal Magistrates Court rather than the Federal Court may have an effect on costs because the initiating fees are lower, there are no daily hearing fees and the waiting list is shorter.[31] In addition, there are certain aspects of the Federal Magistrates Court procedure which function to contain proceedings. For example, fees for interlocutory, interim and procedural orders are slightly greater than in the Federal Court and the Federal Magistrates Court requires written notification of motions.[32] One possible disadvantage of using the Federal Magistrates Court is that interrogatories and discovery are not allowed unless the Magistrate declares it to be appropriate in the interests of the administration of justice.[33]

The second problem in instigating infringement proceedings is that it opens the grantee to the risk of being countersued. This means that the defendant might sue to revoke the grant of plant breeder's rights in the variety in question, either on the basis that the variety is not new or because there is some other reason why the PBR should not stand (s 54). This is a normal strategy in patent cases and we would expect it to be equally popular in PBR matters.

The most significant problem relating to enforcement of PBR through an action for infringement, however, is that only the grantee may institute the proceedings (s 54), that is, only the grantee has "standing" to commence proceedings. Any other person, such as a seed marketing company (which may have a license from the grantee to exploit and sell the seed) or a grower (who does not want the seed to become freely available to everyone without reward) must rely on the grantee to protect their interests. In many cases the grantee may not choose to do this. The grantee might be an overseas company for whom the Australian market is too small to justify the expense of conducting litigation; the grantee might be a public research organisation which would prefer to use its research money in other ways; or the grantee may have a relationship with both the alleged infringer and the person who wants their interests protected. For example, the grantee may be a seed company who wants to stay on good terms with both farmer/consumers and the growers who bulk up the seed.

Other intellectual property statutes do not necessarily limit the standing requirements in this way. The *Copyright Act* (Cth) 1968 s 119 and the *Patent Act* (Cth) 1990 s 120(1) allow exclusive licensees to commence an action for infringement.[34] The *Trade Marks Act* (Cth) 1995 the *Designs Act* (Cth) 2003 do limit standing to the registered owner of the trade mark or design. We would suggest that plant breeder's rights have more in common with patents than any other form of intellectual property and that broader standing provisions could prove helpful in enforcement proceedings.

Offences under the PBR Act

Most people we spoke to throughout this project were aware that the PBR Act contained offences which allowed infringers to be fined. Most people were also aware that the fines were quite high for at least some of these offences. However, many growers and other stakeholders expressed confusion over who was meant to prosecute offences under the Act. Many people to whom we spoke in the industry assumed it was the role of the Plant Breeder's Rights Registrar or IP Australia to prosecute an

[30] See FICPI's submission to ACIP Enquiry, *Consideration of extending the jurisdiction of the Federal Magistrates Service to patent, trade marks and designs matters* 2003.
[31] For Federal Magistrate's Court fees see *Federal Magistrates Act* (Cth) 1999 s 120(3) and Federal Magistrates Regulations (Cth) 2000.
[32] For Federal Court fees see *Federal Court of Australia Act* (Cth) 1976 s 60 and Federal Court of Australia Regulations (Cth) 1978.
[33] See *Federal Magistrates Act* (Cth) 1999 s 45.
[34] Although the copyright owner may have to be joined unless the court otherwise orders.

offence. Others assumed it was the role of the Australian Federal Police (AFP) to prosecute the offences.

The PBR Act is silent as to who may prosecute an offence. In this case one must turn to the *Crimes Act* (Cth) 1914 s 13 which provides that "any person" may prosecute a Commonwealth offence unless the Act which creates the offence specifically prohibits that. This does not mean that an individual will necessarily be left to conduct the prosecution alone. Under the *Director of Public Prosecutions Act* (Cth) 1983 s 6 and s 9(3) the DPP also has the power to initiate a prosecution or, if another person has already commenced the prosecution, take over that prosecution.
Anyone who has watched the popular television program *Law and Order* understands that the role of the prosecutor is different from the role of the investigator. In Australia, the role of the AFP is to investigate alleged breaches of Commonwealth offences such as those created by the PBR Act. However, the AFP cannot be forced to undertake an investigation and there is no indication that they would take up an investigation for an individual who wanted to prosecute an offence.

Dealing with PBR

As we have seen, each of the s 11 acts is a form of personal property which can be dealt with by the grantee. So too is the breeder's right to register a new plant variety. The normal way of dealing with this property is by assigning or licensing it, usually (but not necessarily) under a contract.

There are four main types of contracts used in the pasture seeds industry. These are PBR assignment contracts; IP licensing contracts, multiplication or growing contracts, and retail contracts.

PBR assignment contracts are contracts between the breeder and another person to whom the breeder assigns the right to be registered on the PBR register. This may take place before or after the breeder seeks registration of the new variety.

IP licensing contracts are contracts between the grantee and a person to whom the grantee is licensing the right to exercise intellectual property rights granted under the PBR Act, the *Trade Marks Act* (Cth) 1995, the *Patents Act* (Cth) 1990 or any other IP statute. If the IP licensing agreement relates to PBR then it will entitle the licensee to exercise one or more of the s 11 acts. These contracts are often entered into after the grantee has called for tenders from parties with an interest in developing and marketing the seed. If the grantee only allows one person or company to market the seed in a particular area then it is called an **exclusive IP licence.** Under an exclusive licence not even the grantee is allowed to exercise that PBR right. If the grantee allows more than one company or person to market the seed in any particular area then it is a **non-exclusive IP licence.**

Multiplication or growing contract. The third type of contract in the pasture seeds industry is the multiplication or growing contract, usually entered into between the grantee or a PBR licensee on the one hand and a grower, often with specialist experience in bulking up pasture seed, on the other. If the growing contract requires the grower to return all the seed to the grantee or licensee upon harvest the contract is referred to as a **closed loop growing contract.**

Retail contracts. The fourth contract of interest is the contract entered into by retail purchasers. This contract is generally between the grantee or licensee on the one hand and the farmer who buys the seed for an end use eg grazing, fodder production or other on-farm activity. There is rarely any personal contact between the grantee and the buyer – the contract is often in the nature of a unilateral contract or signed by the farmer at the behest of the seed merchant or retailer. The retail contract seeks to bring the conditions of the PBR Act to the attention of the buyer, or may even seek to extend these rights.

The following scenarios may illustrate how these different contracts are used.

Under Scenario One, Company A breeds a new variety of pasture seed. The breeder seeks registration of the seed under the PBR Act. If the plant is accepted as distinct, uniform, stable and not previously

exploited then it will be registered and at that point the breeder/grantee acquires the exclusive rights mentioned above. Company A may then grow and market the seed personally or can enter into a **growing contract** with growers to grow the seed. The contract is a closed loop contract which requires the grower to return all seed to the company. Company A markets the harvested seed returned to it. The company may or may not enter into a **retail contract** with the ultimate customer for the seed.

Scenario 1: Breeder markets PBR variety bulked up by pasture seed growers

Company A is a large company which breeds and markets seed. It breeds and registers a new plant variety on the PBR Register and acquires PBR in the reproductive material of that variety.

Company A enters into **growing contracts** with individual growers to bulk up the seed. Part of that contract is that the grower will return harvested seed to Company A. This is called a **closed loop multiplication contract** or **closed loop growing contract.**

Company A then markets the harvested seed. Company A may or may not attach terms and conditions to the retailed product under a **retail contract**.

Alternatively, the breeder of a new variety may prefer to restrict his or her activities purely to breeding and leave the marketing to an expert. In this case Breeder B, after registering the new variety, may call for tenders from interested seed companies who want to market the new variety. Breeder B enters into an **IP licensing contract** with Seed Marketing Company C which in turn will enter into **multiplication contracts** with one or more growers to bulk up the seed. Once the grower returns the seed to Seed Marketing Company C, the Company will market the seed and may or may not impose contractual conditions on retail purchasers under a **retail contract** (Scenario Two).

Scenario 2: Breeder licences IP to Seed Marketing Company which markets PBR seed bulked up by pasture seed growers

Breeder B breeds and registers a new plant variety and acquires PBR in that variety.

Breeder B enters into **IP licensing contract** with Seed Marketing Company C to grow, market and deal with the new variety.

Company C enters into **closed loop growing contract** with individual growers to bulk up the plant variety.

Company C then markets the harvested seed. Company C may or may not attach terms and conditions to the retailed product under a **retail contract**

Under Scenario 3, the breeder does not want to be responsible for growing or marketing the seed at all. After breeding a new variety the breeder enters into a **PBR assignment contract** with Seed Company D which becomes, after registration of the variety, the grantee of PBR. Seed Company D then enters into **closed loop growing contracts** with growers and then markets the seed, with or without a **retail contract.**

Scenario 3: Breeder assigns PBR rights to Seed Company which markets PBR seed grown by pasture seed growers.

Breeder breeds new variety.

Breeder enters into **PBR assignment contract** to assign the right to be registered on the PBR register to Seed Company D

Seed Company D is registered on the PBR register and enters into **closed loop growing contracts** with growers to bulk up the seed.

Seed Company D markets the harvested seed.

Growing contracts do not depend on the existence of PBR. Breeder E might breed a new variety and decide not to register it under the PBR Act because of cost or time or because the breeder does not think registration is useful. In this case the Breeder does not own any exclusive rights to license or sell so the Breeder will be responsible for developing and exploiting the seed personally. The Breeder will need to enter into tight **closed loop growing contracts** with growers to prevent leakage of the seed into the public domain (Scenario 4).

Scenario 4: Breeder enters into closed loop growing contract with growers for non PBR seed.

Breeder D breeds new plant variety but decides not to register it under PBR.

Breeder D enters **closed loop growing contract** with individual growers to bulk up the seed.

Breeder D then markets the harvested seed either wholesale or retail.
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Alternatively, Breeder E may decide to register a trade mark which will be applied to company seeds generally or to a particular seed variety..In this case Breeder E may enter in **IP licensing agreement** to allow Seed Company F to market the seed using that trade mark. Seed Company E enters into a **closed loop growing contract** with growers and sells the harvested seed upon its return under that trade name (Scenario 5).

Scenario 5: Breeder registers a trade mark for its seed varieties generally.

Breeder E breeds new plant variety and wants to sell it under the breeder's registered trade mark.

Breeder E enters into a **trade marks licensing agreement** with a Seed Company F which entitles company to deal with seed marked with the trade mark.

Seed Company F enters **closed loop growing contract** with individual growers to bulk up the seed and markets harvested seed.

From these scenarios it is easy to see that for pasture seed growers the most important contract is the multiplication or growing contract. For graziers, the most important contract is the retail contract. And for seed marketing companies and breeders the most important contracts are the IP licensing and PBR assignment contracts.

Relationship between PBR and Contract Growing

As these scenarios illustrate, the existence of multiplication or growing contracts in the pasture seeds industry is not dependent on the existence of PBR. In the scenarios above, growing contracts exist where there is PBR (Scenarios 1-3), where there is no PBR (Scenarios 4 and 5) and where the breeder is relying on a different type of intellectual property such as trade mark (Scenario 5). Growing contracts are used when the PBR grantee is responsible for bulking up and marketing seed (Scenario 1) and when the PBR grantee has licensed or assigned this right to someone else (Scenarios 2 and 3).

As we saw in the last chapter, the relationship between PBR and contract growing in the Australian pasture seeds industry is that the creation of intellectual property rights in pasture seeds accelerated the separation of breeding and marketing and the development of a specialist seed marketing sector. Whether the person contracting with the grower is the owner of PBR or not, the growing contract is crucial to the maintenance of these modern marketing networks.

The growing contract serves three main purposes. First, like all commercial contracts the contract will share risk between the parties. Second, the contract allows the seed marketing company to set standards to ensure quality, consistency and market supply. These purposes apply whether or not intellectual property subsists in the variety and regardless of whether the contractor is an owner or licensee of any IP. However, if there is no intellectual property in the variety, or if the seed company is merely a licensee and not the owner of intellectual property in the variety, then the contact serves a third purpose in addition to those already mentioned. In this case the contract is also used to limit what the grower may do in relation to the seed. In these cases the contractor cannot rely on the statute to limit these rights so must rely on the contract instead.

Taking all these matters into account, from the grower's point of view it may make little difference whether the growing contract is with the PBR grantee or a licensee. It may not even make any difference whether the contract is for growing a PBR variety or a non PBR variety.

A quick look at trade marks and patents

PBR is not the only form of intellectual property which might be used to protect plants. Some plants might be eligible to be registered under the *Patent Act* (Cth) 1990 if they can be shown to be a manner of new manufacture, novel and not obvious. This can be difficult to prove in relation to plants bred by selection but may be easier to establish if the plant is genetically modified, for example. Under the *Patent Act* the patentee is granted the exclusive right to "exploit" the invention. This would probably include all of the s 11 acts under the PBR Act. Some commentators suggest that it would be preferable to protect plants by way of patents because the *Patent Act* does not contain as many defences. These commentators assume that farmers would have no right to save seed under the *Patent Act* and that experimental breeding would not be permitted. Neither of these opinions has been tested and there are arguments against both.

A more common method of protecting plants is through trade marks. A number of breeders to whom we spoke during this project indicated that they were pursuing this form of protection in preference to PBR protection. The reasons they gave for this were that PBR was too slow, too unpredictable and too difficult to enforce. Further research is needed to determine to what extent these complaints are valid.

Trade marks are a form a personal property which can be assigned or whose use can be licensed. Trade marks are registered in relation to nominated classes of goods or services. In the plant breeding industry for example, a breeder or seed company might seek to register a trade mark in class 31 ("Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals, malt") and or class 42 ("Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software; legal services") and or class 44 ("Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services").[35] It is important to note, however, that trade marks are generally not registered in relation to a single variety. The rights of the trade mark owner are very different to the rights of the patentee or PBR grantee. Under the *Trade Marks Act* (Cth) 1995 the trade mark owner is granted the exclusive right to use the trade mark as a trade mark. A trade mark registration therefore will not prevent someone from buying or selling a particular plant variety but it will prevent them dealing with it under the trade marked name.

Conclusion

Contract growing is not dependent on the existence of intellectual property rights but rather supports the modern seed distribution networks which have arisen in the wake of the introduction of PBR in Australia. Contracts allow the parties to share risk and to manage quality and supply. In addition, because of the difficulties of enforcing PBR, they provide a method of limiting the actions of the grower in relation to the variety being grown.

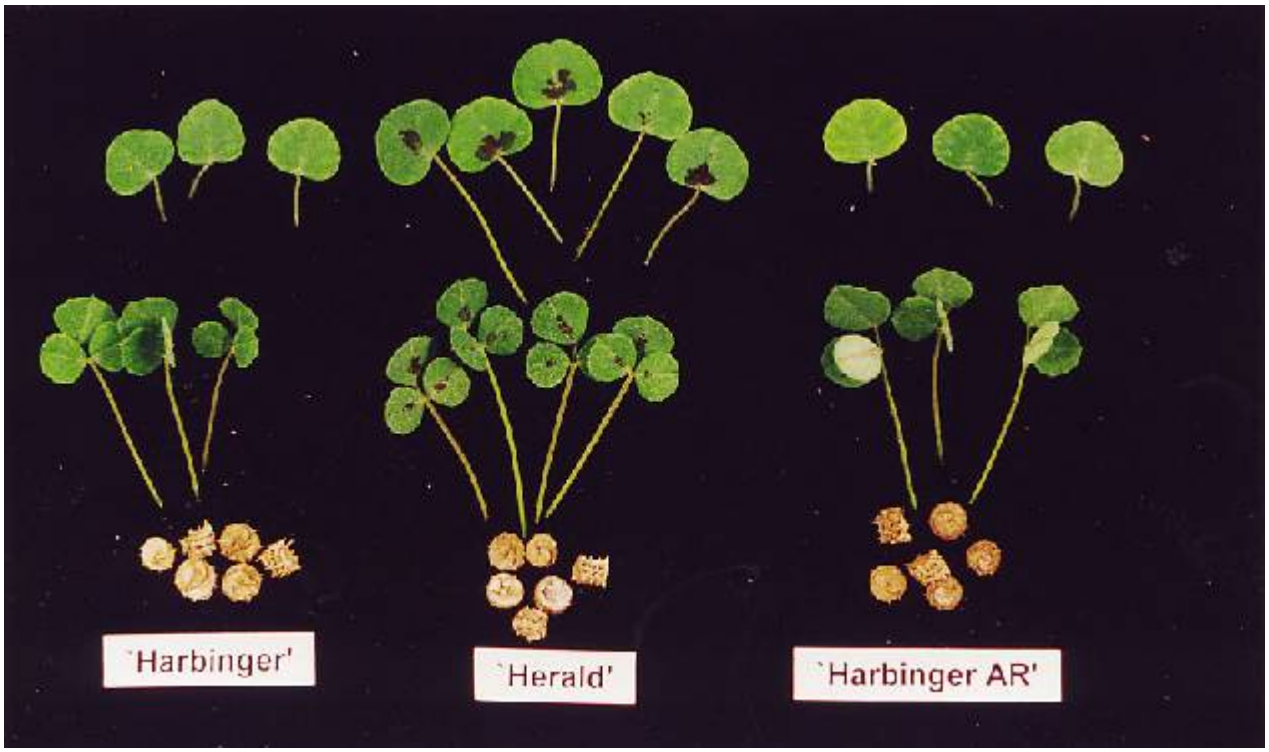
PBR is not the only form of intellectual property used in the pasture seeds industry and there may be a move towards using trade marks rather than PBR even though the rights granted under the *Trade Marks Act are* not as broad as the rights granted under PBR legislation. Future research is needed to investigate how the PBR Act could be improved to meet the concerns of breeders and marketers, especially in relation to enforcement.

Having now seen the role which growing contracts play in the pasture seeds industry; in the next chapter we will investigate grower attitudes to them.

[35] These classes are set out in the Trade Marks Regulations (Cth) 1995 Schedule 1.

Chapter Three

Grower Attitudes to Contract Growing



Strand Medic Leaflets (above) and pods (below) of 'Herald' (centre) and its comparators 'Harbinger' (left) and 'Harbinger AR' (right) showing distinguishing features.[36]

Contact Growing in Context

As we have seen, the increase in contract growing is central to the transformation of the pasture seeds industry. Contract growing was a feature of the pasture seeds industry before the introduction of plant breeder's rights (PBR) but the nature of these early growing contracts was quite different. In the main they were farmer to farmer contracts whereby one farmer would increase his or her pasture seed output, or rationalise farming choices, by contracting with another farmer to produce pasture seed. These might be thought of as horizontal contract arrangements.

A precursor to the modern vertical growing contracts was developed by grower co-operatives in the 1960s and 1970s. These contracts were between grower co-operatives and individual grower members of the co-operative. The contracts set out the conditions for pooling the harvest or establishing other methods of payment and, after an initial period when some grower members elected to market their own harvest, normally provided that marketing would be centralised and conducted by the incorporated body. The purpose of these contracts, as we have seen, was to rationalise and stabilise marketing and prices in the industry.

[36] Images appear courtesy of IP Australia and remain the property of the Australian Government. IP Australia is the government agency responsible for the administration of plant breeder's rights in Australia www.ipaustralia.gov.au.

Modern vertical growing contracts may contain many similar terms to the grower co-operative contracts but their purpose is quite different. The contracts are agreements between a seed marketing company on the one hand, which may or may not be the breeder of the variety being grown, and a grower on the other. In most cases the contract is a closed loop contract and the harvest is returned to the seed company which undertakes marketing. The purpose of the contract is to ensure a uniform and standardised supply of seed to companies which are seeking to manage large scale modern seed distribution networks.

Vertical contract growing should be distinguished from vertical integration. Vertical integration refers to a style of organisation whereby companies are united through a hierarchy and share a common owner. Usually each member of the hierarchy produces a different product or service, and the products combine to satisfy a common need. Under vertical contracting, by comparison, although each party in the chain produces or provides a distinct product or service, there is no common ownership.

There has been a great deal of research into contracting in agriculture. At an international level the United Nations Food and Agriculture Organisation in 2001 produced a wide ranging report, *Contract Farming: Partnerships for Growth,*[37] which considered the preconditions for contract farming as well as the regulatory structures needed to support it. In the United States research has largely centred around legal aspects of contract farming with a focus on the poultry industry where 95% of production is under contract, followed by fruit (57%), dairy (55%) and cotton (51%).[38] In that country, organisations such as the Rural Advancement Foundation International – USA (RAFI-USA), the Farmers' Legal Action Group (FLAG); the University of Missouri Contracting and Organizations Research Institute (CORI) and the Iowa Attorney General's Task Force on Production Contracts have led the way in analysing contracts and working towards fair and transparent contacting relationships in agriculture.

In Australia, research into contact growing is still relatively new, is likely to be written from within the discipline of agricultural economics and is focussed on the impact of Australia's highly concentrated retail food industry on farming practices and prices. The Australian Farm Institute's (AFI) recently published *Vertical Contracting in Agriculture: Current Trends and Implications for Farmers and Policy-Makers*[39] provides a useful general overview from within this framework.

There is some general agreement in the literature as to why contract farming appears to be a growing trend. From the contracting company's point of view contract farming provides:

- increased ability to respond to changes in consumer demand by producing differentiated products;
- increased product uniformity;
- traceability; and
- risk management.

From the producer's point of view the advantages are generally perceived to be:

- increased ability to manage cash flow;
- guaranteed access to markets;
- access to inputs; and
- risk management.

[37] C Eaton and A Shepherd, *Contract Farming: Partnerships for Growth*, United Nations Food and Agriculture Organisation, 2001.
[38] Figures from the US Agricultural Policy Analysis Centre.
[39] Australian Farm Institute, *Vertical Contracting in Agriculture: Current Trends and Implications for Farmers and Policy-Makers*, April 2006.

On the other hand, the literature on contract farming varies greatly on the question of whether contract farming is or is not a desirable trend in general, and whether contracts in particular industries are fair and reasonable. There are three aspects to this question:

- does the contract producer maintain autonomy and freedom in relation to farming decisions or does the company impose its decisions on the producer;
- does contract farming reduce the entrepreneurial capacity of producers; and
- do the terms of the contracts reflect a fair deal between the company and producer or are they an oppressive misuse of market power?

Both the University of Tennessee Agricultural Policy Advisory Center (APAC), for example, and the Farmers' Legal Action Group Inc in the United States have identified these questions as central to an investigation of contract farming.[40]

Grower Attitudes to Contract Growing

The Survey

As part of this project we were interested in establishing to what extent the general attitudes identified above were reflected by pasture seed growers in Australia. Questions 4, 5, 6 and 18 were designed to elicit responses from both contract growers and growers who did not grow under contract regarding autonomy and entrepreneurial capacity. Questions 7-17 were designed to elicit grower attitudes to the fairness of the contract. We also asked one question (Question 21) about PBR infringement and one about disputes settlement (Question 22). A copy of the survey is attached to the report (Attachment A).

The optimum number of respondents in an attitudinal survey was considered to be twenty. Ten respondents grew pasture seed under contract and independently; nine grew only independently (that is, not under contract) and one was a seed cleaner who did not grow in the industry but spoke to up to 30 growers a day.[41]

The experience of the growers surveyed was remarkable. Fifteen of the growers had been growing pasture seed on their properties for more than one generation; two saw themselves as relative new comers to the industry because they had "only started selling" pasture seed about thirty years ago; two of the experienced growers had retired from pasture seed growing. For sixteen of the growers, pasture seed growing was the major part of their farming activity considered as a proportion of revenue (if not by reference to acreage).[42]

[40] Farmers' Legal Action Group Inc, *Assessing the Impact of Integrator Practices on Contract Poultry Growers*, 2001.
[41] See question 4 of the survey.
[42] See question 3 of the survey.

Advantages and disadvantages of contract growing under contract

The most striking aspect of the research was the difference in attitude to contract growing between those who grow under contract and those who do not. Of the nine growers who had no contract growing experience each one expressed grave concerns as to the nature of contract growing.[43] Of the ten growers who had experience of growing under contract there was a notable confidence in the nature of the bargain and the effectiveness of the industry.[44] Acknowledging this difference is important from a policy development point of view. Industry leaders who retired from pasture seed growing before vertical contract growing became popular, or who farm in areas where public varieties are the preferred variety, tend to reflect the views of non contract growers in the industry and have greater concerns about the fairness and efficacy of contract growing.

Of the nine growers who had no contract growing experience each one expressed grave concerns as to the nature of contract growing …. of the ten growers who had experience of growing under contract there was a notable confidence in the nature of the bargain and the effectiveness of the industry.

The benefits of contract growing as perceived by contract growers were price stability, earlier payment, being released from the responsibility of marketing, and the fact that contracting allowed growers to budget more effectively, even if the prices received were not always the highest. Having access to particular varieties was also seen as one of the major advantages of contract growing.

Amongst contract growers the disadvantages were primarily related to limited tonnage. Some growers thought it was a disadvantage that they missed out on higher prices and that there was little they could do with excess harvest. Two mentioned seed companies reneging on contracts but this related to a company going out of business rather than a pattern of behaviour. One person complained that he had "probably gone out and harvested when it's been economically unviable to us, just to keep pace with the companies". This grower emphasised that this pressure had come from himself rather than the company. The fact that a contract might not continue was mentioned by one grower and it is important that growers factor this possibility into their costings. One grower expressed concern that the variety might be unknown.[45]

Contract or independent growing

Growers were asked how they decided whether they would grow under contract or independently.[46] We had assumed that the decision of a grower on whether to grow under contract or independently would be affected by many factors including price and personal preference for being independent or not. Overwhelmingly, however, both independent and contract growers responded that their decision was driven by the question of access to varieties. If the grower wanted to grow a variety which the company only allowed to be grown under contract then the grower entered a contract with that seed company. If the grower wanted to grow a public variety then the grower maintained independent growing. The question of whether the seed was protected by PBR seemed to be immaterial to this decision. One grower for example noted that 80% of his pasture seed was grown under contract and 20% was grown independently. All the independently grown pasture seed came from public varieties. Of the contract pasture seed, 50% came from registered PBR varieties and 50% from non registered varieties.

[43] See question 18 where non contract growers were asked to identify the benefits and disadvantages of growing independently.
[44] See question 6 where contract growers were asked to identify the benefits and disadvantages of growing under contract.
[45] Question 6
[46] See question 4.

Interestingly, most growers did not express an opinion as to whether they thought it was a good or bad thing that their growing decisions were determined by the question of access.

Growers were asked how they decided whether they would grow under contract or independently… Overwhelmingly both independent and contract growers responded that their decision was driven by the question of access to varieties.

Choosing Varieties

This outcome is reflected in the answers to question five where growers were asked how they decide what variety to grow.[47] Only five growers mentioned that PBR was an issue to be taken into account. Rather, agronomy, price and yield were the determining factors in deciding what to grow and all but two growers believed that accreditation was important to their decisions.

One of the five growers thought PBR registration was important because the grower (incorrectly) assumed that genetic purity was guaranteed by registration on the PBR register. However, the distinctiveness, uniformity and stability of variety required for registration under the PBR is not a guarantee that either the variety is still genetically pure or that any particular seed batch is genetically pure. The relationship between variety stability and the modern marketing of pasture seed was well described by one grower in the following terms: "…in a lot of cultures it is a good thing if a seed can sort of adapt to its environment and become stronger and so forth… but when it comes to marketing our customer wants to know that what they are paying for, they are going to get. So they are not particularly interested in something that might grow really well in the Goulburn Valley. You know, what they want is the particular seed they are paying for." This is a sentiment that marketers in just about any industry might recognise.

"…in a lot of cultures it is a good thing if a seed can sort of adapt to its environment and become stronger and so forth… but when it comes to marketing our customer wants to know that what they are paying for, they are going to get. So they are not particularly interested in something that might grow really well in the Goulburn Valley. You know, what they want is the particular seed they are paying for."

Master of My Own Destiny

Even though the decision as to whether to grow under contact or independently was determined primarily by access to particular varieties, once the decision had been made it had a profound impact of the grower's attitude to contract growing.

Both independent and contract growers believed that the greatest benefit of growing independently was precisely that you were independent and "master of your own destiny" (twelve growers). This was usually explained in terms of accepting your own risk and "reaping what you have sowed."

The most striking difference between those growers who had grown under contract and those who hadn't was expressed in terms of farming and farm husbandry decisions. Those who had *not* grown under contract expressed concern that the seed company could dictate farming decisions to the detriment of the grower. One non contract grower suggested that a seed company could force the grower to harvest even when harvesting was not economically viable for that grower due to the small

[47] See question 5.

yield that year; another referred to a fear that the seed company might simply refuse to take the harvest; yet another referred to unmeetable demands that paddocks be weed free. Similar concerns were often expressed by industry leaders with no contract growing experience in initial interviews but it is worth noting that no such concerns were expressed by industry leaders or respondents with experience in contract growing. One contract grower expressed the view that companies only demanded what any good grower in this specialised industry would need to do to ensure seed purity and facilitate accreditation.

This does not mean that contract growers were completely happy with their contracts and the institution of contract growing. One contract grower expressed the opinion that he had been "anti PBR" when it was introduced and, if pushed, would still say that he didn't think multi national companies should be involved in plant breeding in this fashion. His choice to grow under contract was simply determined by access to the variety.

Relationship between the grower and the company

The view that the relationship between the contract grower and the seed company is too uneven and that the contract grower becomes a mere vassal or serf of one company and no longer the master of his or her own destiny is very far from the picture revealed by the attitudinal survey of growers. All contract growers dealt with more than one company; all but two had identified companies with whom they no longer dealt; and all but one of the growers indicated that they had negotiated hard with companies to ensure that their interests were met. The manner in which companies and growers made contact varied. Sometimes the company sought out the grower, at other times the grower sought out the company.

The Terms of the Contract

The question of whether the terms of the contract are fair or unfair was addressed in three ways. Firstly, the project identified general contractual terms which had been considered possible areas of concern in prior research, including FLAG's poultry research and APAC's tobacco growing research. In addition, we conducted informal interviews with industry leaders to identify special issues which might arise in the pasture seeds industry and took advice from the Steering Committee as to issues of concern.

Secondly, we interviewed growers to determine how they assessed the company and the contract terms and sought their attitudes to these terms (Questions 7-17). There was an expected and understandable reticence about disclosing the precise terms of individual contracts but growers were happy to speak about the terms in a more general way.

In analysing these responses we were aware that in *Assessing the Impact of Integrator Practices on Contract Poultry Growers*, there was some correlation between the performance of the producer and the producer's positive or negative assessment of their autonomy and the pricing formula used under the contract.[48] The better performing the producer the happier they were likely to be with these aspects of their contracts. Our survey, on the other hand, deliberately targeted well known and respected growers in the industry who had extensive experience in the industry. We made no assessment of their performance but simply pose the warning that their views may not reflect the views of poor performers in the industry.

[48] Farmers' Legal Action Group Inc *Assessing the Impact of Integrator Practices on Contract Poultry Growers*, 2001, pp 3, 9 and 10.

Finally, we collected pasture seed growing contracts and analysed them from a legal point of view to determine whether they reflected legal concepts of reasonableness. We did not seek to conduct an economic or risk analysis of the contract terms and leave this to agricultural economists in the future.

Four main areas of concern arose out of this process. These were:

- issues relating to evaluation of the contract. Do the terms of the contract vary from company to company? (Question 8) How does the grower evaluate the contract, for example, does the grower seek legal advice? (Question 9)

- issues relating to the company. This included whether the grower was restricted to dealing with one company and what constituted a good company to deal with. (Question 7)

- terms of the contract. Growers were asked about payment terms (question 11); whether the contract was closed loop (question 15); surplus and substandard seed (question 13); risk sharing (question 16); the quality of inputs (question 12); delivery and collection (question 14) and disputes (question 17);

- agronomy advice - who could the grower rely on for advice today and could the company force its growing decisions of the grower? (Question 20).

Legal advice, negotiating and re-negotiating contracts

Most growers thought that contracts varied from company to company. The most common variations mentioned were terms relating to price, timing of contract and how to deal with surplus or surplus seed.[49] Despite this, only two growers sought independent legal advice when evaluating contracts. This is not to suggest that growers simply accepted the terms of the contract offered to them. All but three of the growers interviewed stressed how carefully they evaluated the contract, that they usually had to negotiate terms and in many cases re-negotiated terms if problems arose.[50] As one grower said, "If we feel we need legal advice for the contract, we feel we shouldn't really be signing the contract." It was notable that both independent growers and the two growers who did not evaluate or negotiate terms expressed surprise with these findings.

The most general concern from contract growers and independent growers was that the contracts were "binding". This may seem anomalous given that the definition of a contract is that it a legally binding agreement. Reading the grower responses carefully, however, it seems that growers were concerned that the lack of flexibility in a contract meant that it was difficult to change the terms of the contract if and when conditions changed. [51] On the other hand, one grower took the opposite view and said he would prefer a six year contract because this would reflect the natural life cycle of a paddock.

In practice however, this perceived problem was addressed in two ways. Firstly, it was considered good practice to negotiate in advance "in case things don't work out", for example if there is surplus or substandard seed. Second, all growers who claimed to evaluate their contracts carefully also stressed the importance of being prepared to re-negotiate terms if circumstances change. Pre-negotiation of such clauses is not yet the norm but re-negotiation was considered to be very common.

A number of growers gave examples of successful re-negotiations and "just in case" clauses. One contract provided that the company could re-negotiate a higher price if the market varied significantly, that is the contract provided for a floor price plus a premium if prices rose. The grower reported that he had in fact received higher prices under this contract. Another grower reported that during a

[49] Question 8. It is not clear whether the price variation was due to the fact that the contracts related to different varieties or whether companies were paying different growers different amounts for growing the same variety.
[50] Question 9.
[51] One independent grower also expressed the view that because a contract was binding this would mean that growers could be sued if they failed to produce the amount of seed agreed. In practice however, this was not a concern for contract growers and such clauses did not appear in any contract analysed by this project.

drought "one of the companies … guaranteed not to capitalise on the sale of their seed" and in return the growers agreed not to seek higher prices from the company. Maintaining price stability was seen as beneficial to all parties from a marketing point of view. The grower concluded, "I can't guarantee in all instances that (they did stick by their agreement not to charge any more), but in most cases they did." [52]

Another grower reported that during a drought one seed company guaranteed not to capitalise on the sale of their seed and in return the growers agreed not to seek higher prices from the company. Maintaining price stability was seen as beneficial to all parties from a marketing point of view.

The company

All of the growers interviewed dealt with more than one company and all but two had identified companies with whom they would no longer deal. All but one of the growers indicated that they had negotiated hard with companies during the term of the contract to ensure that their interests were met.

What makes a good company?

The biggest determining factor on how to choose a company came down to the varieties which the company were offering but the company's honesty was still the most important aspect of what made a good company. This was followed by their ability to pay on time and their agronomy expertise. There was a general concern with companies who were seen as choosing "the weakest link", that is, companies who just sought out the cheapest growers regardless of their skills and husbandry abilities. This was seen as not only undermining the prices paid to good growers but also likely to harm the seed's reputation in the market

One grower summed up these ideas in the following way, "It needs to be a two way partnership. The companies need to be willing to listen and want to have a quality product at the end of the day because a lot of them may go with the weakest link, whoever will grow for the least amount of money, rather than end up with a better product. What is important is the company's ability to pay on time, their expertise, knowing the varieties and what their yield potential is. And a lot is to do with being on the ground, out in the paddock, looking at what is happening."

Interestingly, no growers said they relied on recommendations from other growers as to which company to deal with although it was acknowledged that growers did often speak to each other about these matters.

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What is important is the company's ability to pay on time, their expertise, knowing the varieties and what their yield potential is and a lot is to do with being on the ground out in the paddock looking at what is happening. "

[52] Question 11

Payment terms

In relation to payment terms, growers distinguished between limited tonnage contracts where the company agreed to buy a certain number of tonnes, and whole of harvest contracts whereby the company agreed to buy the whole of a grower's harvest. Although most growers said they would prefer a whole of harvest contract, in fact they all had limited tonnage contracts.[53] Our own analysis of contracts suggests that whole of harvest contracts are very rare.

Closed loop growing contracts

All contract growers had closed loop agreements and were required to sell seed back to the company and not sell to anyone else. All contracts took away the farmer's right to save seed although this had sometimes been allowed in the past. When asked if they would like to keep seed for themselves only one grower said yes - and that was a "definite yes". As we have seen, closed loop growing contacts can be used in relation to both PBR and public varieties and this was in fact the case in relation to the growers surveyed.

Remembering that each of the contracts considered was for limited tonnage, closed loop growing contracts posed a significant problem for growers in the case of surplus seed. If the grower is not allowed to sell surplus seed to anyone else either because it is grown under a limited tonnage closed loop contact or because the seed is a PBR variety then this seems to suggest that the only thing that the grower can do is destroy the surplus seed. In practice however this does not appear to happen.

Surplus and substandard seed

All growers whether growing under contract or not, agreed that surplus seed was one of the biggest problems for contract growers. Given this level of concern, and the possible economic impact of surplus seed on both the grower and the company, best practice would suggest that this is an issue which should be addressed in the initial rounds of negotiating the growing contract. However, only two of the growers surveyed regularly negotiated solutions (such as lower prices) for surplus seed at this point. Instead, the majority of growers and companies chose to consider a solution only after the problem arose.

In practice, the responses to surplus seed were varied and sometimes depended on whether the seed being grown was a public variety or a PBR seed. Where the seed was a public variety it was generally agreed that the grower would seek out alternative markets for the seed and sell whatever was possible. Where the contract related to a PBR variety most growers reported that companies would generally negotiate a lower price for that seed and buy it themselves. Where there was a growers' group, the harvest was pooled. One grower was allowed to "brown bag" the seed but this seems to be quite unusual in Australia.[54] Brown bagging refers to the practice of selling a trade marked or PBR variety without referring to its trade marked or commercial name.

The issue of surplus seed is closely related to the question of risk sharing and the sustainability of the economic enterprise. As one grower, reflecting the views of the majority said,

"… quite often we have had a poor year – there are weather conditions that cause our crops not to be there, well we don't get a profit in that particular year, and then when we get a good crop, if they don't take our surplus then we don't average out. So that is a pretty tricky one but it is one we live with."

[53] Question 8
[54] Question 13

Although growers who do not grow under contract often expressed concern that companies would reject seed by unfairly asserting that it was substandard this was not a view shared by contract growers. Contract growers accepted that substandard seed could result for many reasons and all contract growers reported that either they had negotiated a price in advance for substandard seed or would re-negotiate a lower price if necessary.[55]

"… quite often we have had a poor year – there are weather conditions that cause our crops not to be there, well we don't get a profit in that particular year, and then when we get a good crop, if they don't take our surplus then we don't average out. So that is a pretty tricky one but it is one we live with."

Effort, cost and risk

Asked whether the contracts adequately reflected effort and cost the answers were quite diverse and may depend on the variety grown. A well know variety with a well established market carried less risk for all participants and it was simpler to negotiate a fair risk sharing. In the case of lesser known varieties the level and nature of the risk was less easily calculated and growers were less sure that the risk was fairly shared. Some growers noted that experienced growers were in some cases more likely to understand the risks involved in a particular growing exercise and needed to educate companies, especially in regard to the cost of good husbandry (including the cost and time needed to prepare paddocks) and the demands of accreditation. A number of growers suggested that seed companies were not fully aware of these demands. This is understandable if the company is a marketing specialist and neither a breeder nor a grower.[56]

One of the issues often raised by industry leaders is that it is unreasonable and unfair to require "weed free" paddocks under the contract. A number of contract growers commented on the requirement for paddocks to be weed free. Most growers did not express a strong opinion about this matter and one grower stated that the requirement to be weed free was "definitely reasonable. I mean it is in our best interests to keep the crops clean. You know, clean crops, more yield."

A number of growers suggested that seed companies were not fully aware of the demands of good husbandry. This is understandable if the company is a marketing specialist and neither a breeder nor a grower.

One contract grower had an experience of a seed company simply not taking up the harvest because the company had gone out of business and two growers were concerned that there was a disjunction between the demands of accreditation and the contracts in question. For example, in order to grow accredited seed a paddock might need to be free of other crops for a period of three years but a contract might only be for one year. One grower was not convinced that the seed companies took this into account in setting prices and this is certainly an issue which growers should take into account during contract negotiation.

When asked whether risk was fairly distributed, growers expressed the view that under a limited tonnage contract the company gets all the benefits and the grower carries all the weather risk. One grower took a positive view of this and pointed out that "at least the companies do not penalise for under production".

[55] Question 12
[56] Question 11

Quality of inputs

Growers were asked whether the quality of the seed provided to them for growing was guaranteed and what happened if the seed they produced was not up to standard.

No grower knew whether the seed provided was guaranteed and most simply relied on certification documentation. However, five of the growers had in fact had problems with the standard of the seed delivered and in two cases the growers had to have the seed re-cleaned before sowing. This was seen as a "New Zealand" problem and needs to be investigated.[57]

Timeliness of deliveries, collection and packaging

Growers were asked about the timeliness of deliveries, collection and packaging issues. There were no complaints about collection but more than half of the growers complained about late deliveries, especially from New Zealand which is in the same time and season as Australia. Unless the New Zealand company has carried seed over from a previous year then their harvest, by the time it has been cleaned, tested and shipped to Australia, will be late for the optimum sowing time in Australia. "… so when we should be sowing…in early March, we sometimes (have had to wait) until the end of April… That is the real bug there that we have tried to overcome but haven't done it successfully."[58]

There was a surprisingly high level of complaint about packaging, with a number of growers stressing that the packing and labelling provided by companies did not meet OECD standards. [59]

Contract Disputes

Seven contract growers had experienced contract disputes and all negotiated a satisfactory outcome in informal negotiations. Of the three who hadn't had disputes, two said it was because they were pedantic and had negotiated every eventuality beforehand. Only one had started using an arbitration clause in the contract but was advised it was not a good idea to use it and went back to informal negotiations. The grower assured the interviewer that this was not perceived as a threat by the company. Although most growers had heard of the Australian Seed Federation's Dispute's resolution process and most said they would be happy to use it, in fact, no one had yet done so.

Agronomy advice

There has been a lot of discussion in the industry regarding the decline of the public agronomist (employed by the local Department of Agriculture) and the rising dependence on seed marketing companies for advice regarding seed choice and other growing decisions. We therefore asked growers who they relied on for such advice and whether they were happy with the situation.

Apart from one grower who said that the grower didn't need to rely on anyone because they were the experts in the public variety which they grew, all growers relied on a range of sources for advice and displayed quite sophisticated awareness of the possible limitations of any particular advice giver. Other growers, agronomists employed by either the seed company or Department of Agriculture, retail and wholesale sellers, other seed company employees and seed cleaners were sources of information relied upon by growers and in most cases growers consulted a range of these sources and came to their own decisions.

Although there had been some suggestion by growers that seed companies were losing their growing expertise, there was little or no suggestion that growers relied on poor advice from seed companies or felt they were incorrectly directed to follow poor company advice. It was noticeable that few growers paid for independent advice.

[57] Question 12
[58] Question 14
[59] Question 14

PBR Infringement

Most of the growers interviewed believed there was little PBR infringement in relation pasture seeds, at least in relation to growing and multiplying seed. They identified three reasons for this:

- harvesting of pasture seed is difficult;
- it is easy to trace; and
- it is a very specialised market.

This was different to the views of some industry people, one of whom suggested there were "truck loads" of infringing seed in his area.

Some growers suggested that at the consumer level there may be some infringement and a little brown bagging (that is, selling unmarked seed) but this was not thought to pose a great threat to their own specialist growing activities.

It has sometimes been suggested at an industry level that one of the reasons there have been so few infringement proceedings under the PBR Act is that people in rural areas do not want to give evidence against their neighbours or potential customers and clients. That is, the focus has been on social issues. However, in the interviews the majority of farmers focussed on a structural issue. The majority suggested that the main reason why there were so few actions under the PBR Act was because infringement affects marketing and not breeding and therefore the breeders are not interested in taking action. This is particularly significant because, as we saw in the previous chapter, only the breeder, or a registered grantee claiming through the breeder, is able to take an action for infringement under the PBR Act.

However, in the interviews the majority of farmers focussed on a structural issue. The majority suggested that the main reason why there were so few actions under the PBR Act was because infringement affects marketing and not breeding and therefore the breeders are not interested in taking action.

Most interviewees didn't distinguish between civil actions for infringement and criminal prosecution under the PBR Act although most used the language of criminal law and spoke of fines and penalties rather than damages. It was not clear whether this was because they genuinely did not understand the difference between a civil and criminal action or whether it was because they believed that the state should take action for infringement because breeders were unlikely to do so.

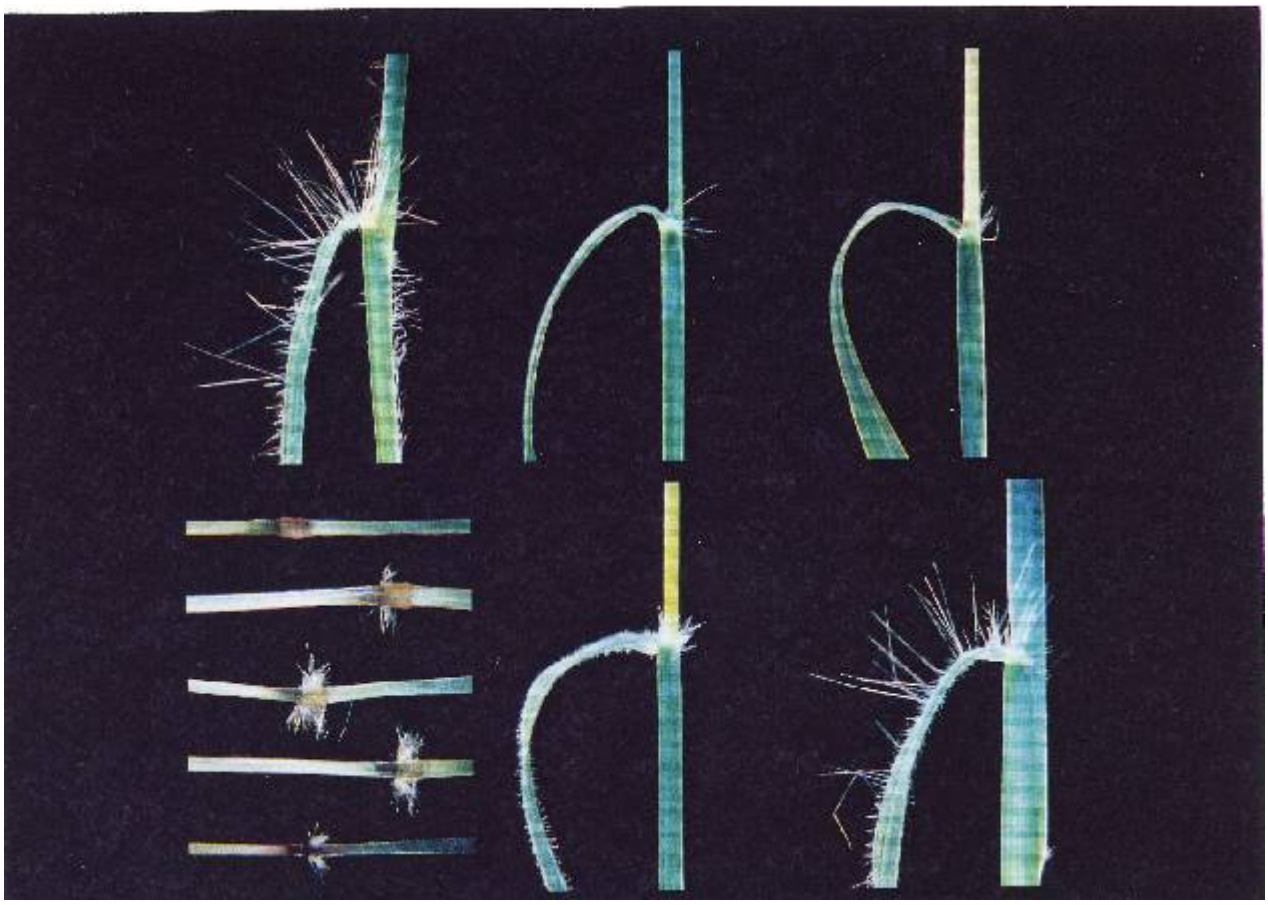
Conclusion

These are very complex responses to complex issues but the following points are of particular note. Whilst contract growers generally support contract growing, those without experience of contract growing are very suspicious of it. At the same time, however, both groups expressed the view that independent growing had the advantage of making the grower the "master of his own destiny". This did not mean that contract growers felt oppressed by the contractual relationship but rather that independent growing allowed growers to accept and determine their own risk. The reason a person decided to take up contract growing, therefore, was not primarily to shift risk but rather to gain access to varieties not otherwise available.

Although the contractual relationship was seen as a partnership this did not mean there were no disputes. In fact, disputes were the norm and the majority of contract growers were willing to negotiate or re-negotiate hard to ensure that the contractual terms were suitable. It was impossible to determine from this survey whether the terms of the contract were indeed fair but the contract growers interviewed were confident in their ability to negotiate a deal if necessary. In the next chapter we will try to determine in a more objective fashion whether contracts used in the pasture seeds industry are indeed fair.

Chapter Four

Legal Analysis of Growing Contracts



Bothriochloa pertusa Top right to left 'Medway', 'Yeppon', 'Bowen'. Bottom right to left 'Emerald', 'Dawson'. Bottom left: Hairiness of top node, Top to Bottom: 'Medway', 'Yeppon', 'Bowen' 'Emerald', 'Dawson'[60]

As part of the project we collected twenty growing contracts used in the pasture seeds industry. We included contracts used by public breeding and marketing institutions as well as contracts used by private companies. In this chapter we will discuss important legal issues which arise in relation to growing contracts. These issues will in some cases differ from the issues identified as issues of concern by growers and industry leaders in the previous chapter. This is to be expected – many of the matters discussed in this chapter are matters which only have immediate significance for lawyers. For the parties to the contract these matters will only become important if a dispute arises.

It has been shown that few experienced contract growers from our survey sought independent legal advice before signing contracts and in informal interviews with seed companies it was revealed that many draft their own contracts. In some aspects this is not a problem. Growers and the companies may be the best people to make informed decisions as to the appropriate acceptable level of weed for any particular variety; how substandard seed is to be determined; what payment if any should be made for substandard seed; how surplus seed will be dealt with and the timing of deliveries. On the other hand, as this chapter will demonstrate, there are some very fine legal points which neither the grower nor the company are likely to consider which should ideally be clarified before a dispute arises.

[60] Images appear courtesy of IP Australia and remain the property of the Australian Government. IP Australia is the government agency responsible for the administration of plant breeder's rights in Australia www.ipaustralia.gov.au.

… there are some very fine legal points which neither the grower nor the company are likely to consider which should ideally be clarified before a dispute arises.

Contract Terms in Details

What is the contract for?

This may seem a simple question but it isn't. It is not always clear from the contracts surveyed whether the contract is for

- services, whereby the grower agrees to grow seed to a certain standard; or for
- sale of goods.

Some contracts are very clearly contracts for services. One contract, for example, provides stock seed to the grower free of charge and contains the following clause.

> *The parties agree that the contractor will multiply the seed … according to specifications and standards set out in this contract.*

Other contracts use the terms "Grower" and "Buyer" to suggest that the contract is a contract for sale of goods whereby the grower agrees to sell produced seed to the buyer once it is harvested. However, the same contract is also likely to contain clauses which suggest that it is also a contract for the sale of stock seed to the grower.

Some contracts appear to cover both a contract for services and a contract for sale of goods. The following clause seems to have elements of both goods and services.

> *The grower agrees to grow for and sell to the buyer.*

And others seem to cover all possibilities.

> *Grower agrees to buy the planting seed from company, and to plant and grow the planting seed for company. Company agrees to buy resulting seed produced by grower on the prices and terms in the contract.*

The question of whether this is a contract to buy and sell goods or a contract to provide services is very important. Legislation such as the *Trade Practices Act* (Cth) 1974 and equivalent state legislation may imply different conditions and warranties into a contract depending on whether the contact is a contract for goods or a contract for services. The extent to which these conditions and warranties apply in commercial contracts varies from state to state, as do the details as to which of the implied terms may be excluded by contract.

The question of whether the contract is a contract for sale or services may also be important for determining whether the grower is classified as a farmer or not. The *Rural Adjustments Schemes Agreement Act* (NSW) 1993 for example, defines a farmer in the following terms

> *Farmer means "a person engaged in the farm sector in a State, the Northern Territory or the Australian Capital Territory, but does not include a person whose business consists principally of the provision of services."*
>
> .

One would hope that any government department or court would understand that contract growing is a normal part of modern farming practice but it may be time to amend legislation which reflects a narrower and out of date view of the business of farming.

What is the relationship between the parties?

This does not exhaust the question of the nature of the contract. Contracts for services are often distinguished from "contracts for service" which are really employment contacts. Most growing contracts are quite clear about this matter and explicitly provide that the grower is not an employee of the company. Clauses such as the following were included in some contracts.

> *The grower acknowledges that he is an independent contractor and is not an employee or agent of the buyer.*
>
> Or
>
> *The grower shall not be deemed to be the agent, servant or employee of the buyer for any purposes under this contract.*

The importance of this clause is that it means the buyer company is not responsible for workers' compensation, superannuation and other employee benefits, nor is the company liable for the acts of the grower in the same way that it would be liable if the grower were an employee or agent of the company.

Payment

One contract for services gave stock seed to the grower free of charge, others contracts charged for stock seed. Payments to the grower for harvested seed were all based on limited tonnage although, as we saw in the previous chapter, most growers would have liked to have a whole of harvest contract.

One contract tried to move all the risk to the grower by providing that the company would have no liability to pay the grower unless the ultimate purchaser had first paid the company. This type of clause may be suitable as part of the contractual arrangements between a grower co-operative and its member-growers but should have no place in a modern commercial dealing between a grower and marketing company.

One contract tried to move all the risk to the grower by providing that the company would have no liability to pay the grower unless the ultimate purchaser had first paid the company.

Who owns the seed?

The question of who owns the seed, the unharvested crop or the harvest is very important. The question will determine what should be counted within the assets of the farm; whether the seed, crop or harvest can be used as security for creditors and whether creditors will be able to access the seed, crop or harvest in the case of bankruptcy or winding up.[61]

[61] For a simple discussion of these matters see one of the bush law texts available such as Tony Smith, *The Bush Law Handbook, A practical guide to law on the land in NSW*, 2nd edition Redfern Legal Centre Publishing, 2005 or equivalent books in different states.

Contracts distinguish between stock seed or planting seed on the one hand and produced seed or resulting seed on the other. Approximately one third of the contracts reviewed explicitly provided that the stock seed remained the property of the seed company.

> *Notwithstanding the supply and use of stock seed it shall remain the property of the buyer.*
>
> Or
>
> *The grower acknowledges that title in the production seed remains with the buyer.*

Most contracts were silent or confused as to whether the property in the stock seed had been transferred to the grower or whether it remained with the seed company. In this case it may be up to the court to determine who owns the seed if problems arise.

The legal term for the situation where the possession of the stock seed passes to the grower but ownership remains with the seed company is "bailment". It is a little like lending your lawnmower to someone except that your lawn mower is returned, cleaned and repaired. In the case of bailment the law imposes certain duties on the bailee, including the duty to take reasonable care of the property.

The legal term for the situation where the possession of the stock seed passes to the grower but ownership remains with the seed company is "bailment". It is a little like lending your lawnmower to someone except that your lawn mower is returned, cleaned and repaired.

Some people think it is very strange to compare seed of any type to lawn mowers and there have been cases in the United States and in Australia where courts have been reluctant to do this. For example, in Chapman *Bros v Verco Bros and Company* Ltd[62] the High Court of Australia held that there was no bailment when a person left unmarked bags of wheat with a storage agent where the storage agent did not have to return those exact bags of wheat to the person but could substitute any equivalent amount of wheat. In the United States in a case involving a possible lien on a bean crop the judge said:

…it is unrealistic to continue to indulge in the fiction that a bean, which is irretrievably planted in the ground, and whose very existence as a bean ceases as it turns into a plant, may be the subject of bailment, entitling the supplier of the bean to claim all the beans produced from that plant. The parties have essentially entered into a joint venture, with the seed company supplying the seed beans…and the grower … supplying land …together with all the labor…[63]

This does not dispose of the matter however. It is quite easy to argue that there is a significant difference between unmarked wheat in bags left in storage and pasture seed of a particular variety provided to a nominated grower for a specified purpose. Furthermore, other United States courts have recognised that bailment may arise in relation to growing contracts.[64] Finally, if the terms of the contract clearly spell out a bailment relationship then the courts will try to give effect to them.

In relation to resulting seed the contracts examined were much clearer. Most provided that the company was the owner of the produced seed although the contracts varied as to when this ownership may have passed. Some contracts try to deal with everything together.

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[62] (1933) 49 CLR 306.

[63] *Peterson v Conida Warehouses Inc* 575 P 2d 481 at 485 (Idaho 1978). For a full discussion of the United States law on this subject see Neil D Hamilton, "Why Own the Farm if you can own the Farmer (or the Crop)? Contract production and intellectual property protection of grain crops" (1994) 73 *Nebraska Law Review* 48-102.

[64] *Clements Farms Inc v Ben Fish and Son* 814 P 2d 941 (Idaho Ct of App. 1990) and *First State Bank* v *Simons* 13 P 2d 259 (Colo 1932).

The planting seed, resulting seed and crop are and always will remain the exclusive property of the company.

It is noticeable that some contracts moved ownership in the produced seed at one time but risk at another. In this case, the grower might not own the produced seed but would still be responsible for bearing the loss if the seed is destroyed. This is hardly a reasonable deal.

Title to resulting seed will pass to company when company has received a grading certificate for that seed and has notified its acceptance of that seed to the grower in writing. Risk of the seed accepted by the company remains with grower until delivered to the company.

Closed loop growing contracts, collective bargaining and anticompetitive behaviour

The Australian Competition and Consumer Commission (ACCC) has responsibility for administering the *Trade Practices Act* (Cth) 1974 and ensuring that companies do not engage in anticompetitive behaviour including price fixing, market sharing, misuse of market power, exclusive dealings, resale price maintenance and uncompetitive mergers. The ACCC has a Commissioner with special responsibility for rural affairs.

All or any of these matters can arise in relation to contract growing in general and closed loop growing contracts in particular and breeders, growers and seed companies must be vigilant to ensure that their behaviour does not offend these principles. If members of a cooperative set prices for either stock seed or produced seed; if a company misuses its market power to exclude a particular grower or growers from the market; if seed companies or growers try to divide the market into geographical areas or to divide the market between different varieties for example, then in each case they risk falling foul of the *Trade Practices Act.*

The ACCC has power to authorise contracts and arrangements which would otherwise be seen as a breach of the Act if the public benefit in allowing the contract or arrangement outweighs its anticompetitive detriment. Under these provisions the ACCC has authorised contracts or arrangements which allow dairy farmers to collectively negotiate farm gate prices and standards and wine grape growers to prepare indicative price lists.

The Act also provides for a procedure whereby a person or company receives immunity in an action for exclusive dealings if that person or company lodges a notification with the ACCC. A notification differs from an authorisation insofar as it only applies to exclusive dealings, it is automatic after a short period of time and is effective unless the Commission is satisfied that the conduct will substantially lessen competition and either has no public benefit or the public benefit does not outweigh the anticompetitive detriment. The notification procedure effectively changes the onus in these matters.

Some companies are making use of these procedures but the number is small. AWB, for example, has lodged a notification to allow it to enter into semi closed loop growing agreements whereby growers are required to sell PBR protected produced seed only to retailers or other growers who have agreed to pay end point royalties to AWB. AWB relied on the theory that the grants of plant breeder rights in themselves are good for competition to support its notification. Monsanto Australia has lodged a notification in relation to the requirement that cotton growers purchase Ingard cotton seeds from a specific distributor. Monsanto has also lodged a notification in relation to the requirement that cotton growers who wish to acquire Ingard, Bollgard II and Roundup Ready seeds from distributors of Monsanto will need to enter into licence agreements with Monsanto. It is interesting to note that these are two companies which have a very high public profile and they may have thought it prudent to protect themselves before anyone else brought them to task on these matters.

The ACCC's power extends further than this. It has investigated the legality of proposed mergers between Incitec Pivot Ltd and Southern Cross Fertilisers Pty Ltd, for example and between Bayer AG and Aventis Crop Science SA but approved the mergers in both cases. It has also received

undertakings from Nufarm Australia Ltd and Monsanto which prevent them withholding Roundup or other glyphosate products from customers if they acquire similar products from competitors.

The question of whether closed loop growing contracts in themselves raise issues of anticompetitive behaviour has not been addressed in Australia. The issue is likely to be a question of fact in each case and factors such as the number of competitors in the field, the ability of the parties to negotiate fairly, whether the variety is protected under PBR and whether there are in fact public benefits in allowing such closed loop agreements will have to be considered. In the meantime, it might be appropriate for other companies to follow the lead of AWB and Monsanto and notify or seek authorisation of arrangements which they fear may be judged anticompetitive.

Farmer's right to save seed

Under the *Plant Breeder's Rights Act* (Cth) 1994 farmers are allowed to condition and reproduce harvested seed so long as the harvested seed has been obtained legitimately. The section is in the following terms.

s 17 If:

(a) a person engaged in farming activities legitimately obtains propagating material of a plant variety covered by PBR either by purchase or by previous operation of this section, for use in such activities; and

(b) the plant variety is not included within a taxon declared under subsection (2) to be a taxon to which this subsection does not apply; and

(c) the person subsequently harvests further propagating material from plants grown from that first-mentioned propagating material;

the PBR is not infringed by:

(d) the conditioning of so much of that further propagating material as is required for the person's use for reproductive purposes; or

(e) the reproduction of that further propagating material.

(f) the regulations may declare a particular taxon to be a taxon to which subsection (1) does not apply.

This is usually referred to as the farmer's right to save seed. The right was originally included in PBR legislation in recognition of the historic role which farmers have played in plant breeding and in developing the world's germplasm.

There are two questions which arise in relation to farmer's rights and contracting. The first is what the farmer can do with the saved seed. The second is whether the farmer's right to save seed can be taken away by contract.

The wording of the Act gives the farmer the right to condition and grow farm saved seed but it does not mention the right to sell it or otherwise deal with it once the farm saved seed has been planted and subsequently harvested. The wording of the Act appears to assume that the harvest is not seed or other propagating material and therefore that the farmer can sell it without breaching PBR. A farmer could save seed from one harvest of timber for example, condition it, grow it and sell the subsequent timber harvest with no questions asked.

In the case of seed and grain however the situation is different. This is because the harvest, in these cases, is also seed and grain, both forms of propagating material in which the PBR rights still subsist. In this case it seems that the farmer's right to save seed is rendered practically useless.

The Court had to consider this question in *Cultivaust Pty Ltd v Grain Pool Pty Ltd*[65] where barley growers had sold the harvests of first and second generation farm saved seed without the consent of the PBR owner or licensee. The judge in the initial case held that there was an implied term in the growing contract that the growers could sell the harvest of the first generation of farm saved seed but there was no such implied term in relation to second and subsequent generations of seed. This issue was not considered on appeal. Although this decision might be praised for being pragmatic and balanced it relies for its effectiveness on the fact that there was a contract in place and does little to clarify the problem of statutory interpretation. A better solution would be for the legislature to amend the Act to clarify how it applies to seed and grain. In the meantime growers should ensure that this issue is addressed directly in any contract under which they are allowed to exercise their right to save seed.

The judge in the initial case held that there was an implied term in the growing contract that the growers could sell the harvest of the first generation of farm saved seed but there was no such implied term in relation to second and subsequent generations of seed.

Approximately one third of the contracts examined explicitly took away the farmer's right to save seed. The following is a typical example.

> *The grower may not retain any part of the crop for his or her own use or any other person's use, whether for seed or otherwise.*

There is a question as to whether such clauses are enforceable. If the PBR Act is thought of as balancing the rights of the plant breeder against the rights of the community then it may upset this balance to simply allow the right to be taken away under private contracts. This problem is not restricted to plant breeder's rights. In 2002 the Copyright Law Review Committee published the *Copyright and Contract* report to consider this question in relation to the *Copyright Act* (Cth) 1968.[66] The Committee concluded that there was no general rule regarding this matter but that in each case it was a matter of statutory interpretation as to whether any particular defence could be avoided by contract. The Committee also concluded that this was not a satisfactory position and recommended that the Act to be amended to explicitly state which defences could or could not be excluded by contract. Unfortunately the government has done nothing to implement this recommendation.

Of the contracts examined, one appeared to reflect this decision. It allowed the farmer to save, condition and reproduce farm saved seed but explicitly took away the implied right to deal with the harvest of even the first generation farm saved seed.

> *The grower acknowledges that PBR seed cannot be sold or traded without prior written consent from the buyer*.

In the United States there has been a direct challenge on this matter and in *Monsanto Co v McFarling* and *Monsanto v. Trantham*[67] both the US Court of Appeals for the Federal Circuit and a US district court held Monsanto could exclude the farmer's right to save seed under its growing agreements (known as Technology Agreements) for Roundup Ready beans. This was confirmed in *Monsanto Co v* Swann[68] and was not taken up on appeal in the McFarling case.[69]

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[65] (2005) 147 FCR 223 and see on appeal *Cultivaust Pty Ltd v Grain Pool Pty Ltd* (2006) 67 IPR 162.
[66] Copyright Law Review Committee, *Copyright and Contract*, 2002.
[67] *Monsanto v. Trantham* 156 F. Supp. 2d 855, 864 (W.D. Tenn. 2001); *Monsanto v. McFarling* 302 F.3d 1291 2002 US App.
[68] 2003 WL 1487095 at 2-9 (ED Mo Jan 8, 2003).
[69] *Monsanto v McFarling* 363 F3d 1336 (Federal Court of Appeals April 9 2004)

Warranties and guarantees relating to stock seed

Only one of the contracts examined gave any express warranties to the grower in respect to the quality and suitability of the stock seed for the purposes for which it was being provided. In fact, some contracts tried to exclude all liability for any loss or damage resulting from any action of the company including the provision of unsuitable stock seed.

As we saw above, certain statutes imply conditions and warranties into contacts as to the suitability of the goods and services. Some of these conditions and warranties can be excluded, others cannot. Two contacts contained very detailed exclusion clauses which attempted to exclude any condition or warranty, express or implied, as to description, growth, quality, purity or productiveness of the seed stock and stated that the company would not be responsible for resultant crop. These contracts also tried to limit any liability for non excludable terms and warranties to either the cost of replacing the seed or $4.80 per acre for the expected yield (whichever is lower).
The effectiveness of these exclusion clauses will vary from state to state but it is clear that not even the company's contract drafters are prepared to clarify just what is or isn't excluded by these clauses. It is arguable that in this case there is no real agreement and certainly it is not recommended that parties should sign a contract with such elements of uncertainty.

Warranties and guarantees relating to goods and services provided by the grower

As we have seen above, some of the growing contracts could be characterised as contracts for services whereby the grower agrees to provide services to the company. In other cases they may be characterised as contracts for the supply of goods whereby the grower agrees to sell produced seed to the company. However, none of the contracts examined contained any warranties regarding these goods or services nor did they attempt to exclude them where appropriate. Such a difference in the treatment of the grower and the company liability suggests that there is an unacceptable imbalance between the parties in relation to the bargain.

Quality of produced seed and weeds

All contracts contained some provision to determine the required standard of harvested seed. The majority tied the standard to the "Certifying Authority", OECD standards or appeared to rely on National Seed Quality Standards for Certified Seed as agreed by the Australian Seed Federation and the Grains Council of Australia. However, at least some of the contract standards were higher than theses official standards. If this happens, parties to the contract should factor into their prices the extra burden that higher standards might impose.

There is a common belief in the industry that there are contracts which say that the grower is to ensure that there are no weeds in the seed paddocks. Of the contracts surveyed we did not see one which went that far but we did note contracts which teetered on this edge of this.

> *The grower will diligently tend and protect the seed and the crop grown from the seed from all manner of damage including theft, fire, flood, stock, pest plants and animals, insects and other pests, disease and chemicals.*

On the other hand, most contracts did have a clause requiring the grower to maintain harvesting, storage and transport equipment free from other seeds and contaminants.

> *The grower will harvest the crop in good order and ensure all machinery used to harvest, store and transport the crop is clear and free from contamination, disease and other seeds.*

Surplus Seed

In the previous chapter we saw that there was some concern amongst non contract growers as to whether the surplus seed provisions under contracts would be misused Contract growers reported that they either negotiated this matter up front or dealt with it by negotiation when the problem arose.

The majority of the contracts examined contained very detailed provisions relating to surplus seed. Most defined surplus seed as seed in excess of the tonnage contracted for the particular grower in question. Some, however, defined surplus seed as seed in excess of the total tonnage contracted by the company with all growers. Where there was an excess in total tonnage some contracts provided that they would deal with surplus seed split proportionately amongst all growers who had produced surplus seed. That is, growers who didn't individually produce surplus seed were not to be disadvantaged by the dealing. There is no consistency regarding dealing with excess seed and the following are a sample of relevant clauses.

> *If the company accepts the seed then property in harvested seed which is in excess of the amount required shall thereupon vest in the grower immediately and the grower may use, sell or otherwise dispose of the surplus seed in his own name and in such manner as he sees fit.*
>
> Or
>
> *If the company decides not to accept the seed then property in all harvested seed will thereupon vest in the grower and the grower may use, sell, or otherwise dispose of the harvested seed in his own name as feed for livestock or for milling but for no other purpose except with the prior written permission of the company.*
>
> Or
>
> *If there is any resulting seed which the company does not purchase under this contract, grower will as soon as possible after the issue of a grading certificate for that seed give company written proposal for disposing of that seed. Grower will dispose of that seed in accordance with the reasonable directions of the company and any applicable law.*
>
> Or
>
> *If the grower produces quantities of the produced seed in excess of the seed production quota the Grower appoints the company as the exclusive agent to sell or otherwise trade in those excess quantities of produced seed upon such terms as the company determines.*

Given that it appears that most growing contracts are for limited tonnage it is important that parties be clear about what will happen with surplus seed.

Substandard seed

All but one of the contracts made provision for how to deal with substandard seed. Approximately one third of the contracts relied on the International Seed Federation (ISF) formula for establishing a new price for herbage, oil and fibre seeds in the event of the produced seed not meeting the agreed standards. This is:

$$\frac{L \times A}{G} = X$$

Where L = delivered quality
G = contracted quality
A = contract price
X = new price

Some contracts gave the company the option to accept or reject the substandard crop and it was only if the company decided to accept the produced seed that the ISF formula would apply.

Other contracts made no provision for calculating an agreed price but simply made broad statements about what would be done.

> *If the crop is rejected by the certifying authority during the growing period, the crop shall not be harvested without the permission of the buyer and, if required by the buyer, shall be destroyed at the grower's cost.*
>
> Or
>
> *If the crop does not meet the quality requirements set by the contract, the buyer or the agent has the right to reject the crop or sell or dispose of the crop at a value as determined by the buyer at its absolute discretion.*
>
> Or
>
> *Should any of the produced seed fail to meet the standard specified then the company will use its best endeavour to sell the inferior seed at the best price obtainable and the grower shall not sell, dispose or otherwise trade with the inferior seed without the prior consent of the company.*

Company inspectors

One of the concerns often raised about contract growing in agriculture is that it takes away the grower's autonomy and allows a seed company to determine relevant growing decisions. None of the contract growers surveyed expressed any concerns with this and instead expressed the opinion that agronomy expertise was one of the features of a good seed company.

As previously stated, however, our interviewees were experienced growers and they may not be the types of growers whom companies try to direct, nor are they likely to be the type of growers who will accept bad advice. Contracts, however, are drawn up for experienced and inexperienced growers and half of the contracts examined had express provisions which allowed the company to enter onto the property and direct the growing operations of the grower.

> *The grower will use suitable agronomy practices and follow the specific directions of the company and specifically comply with the terms of the agreement.*

One contract tried to protect itself from liability for not giving advice whilst maintaining its right to do so.

> *The company can, but does not have to, give to grower all instructions which the company thinks necessary about the husbandry of the crop, including instructions about when to harvest, thresh or cut the crop.*

Some contracts contained complete quality assurance programs and clear guidelines for growing the seed which matched the seed certification requirements for the variety. One contract provided that company representatives could enter at any time for the purposes of inspection.

> *Grower must give the company's representative access to the crop and land, in order to check security, take samples of the crop and to inspect machinery at any time.*

Finally, one contract (characterised as a contract for services) allowed the company representatives to enter the land, do the work required and then charge the grower for this work.

> *Should the grower fail to perform any of his obligations under this agreement then the company shall have the right, after giving the grower twenty-four hours notice in writing, to enter the growing area together with workmen, contractors, plant and equipment and materials and do all things which the grower has failed to do and in such an event the grower will be responsible for the company's reasonable costs.*

This final clause is another example of a contact where the company is attempting to shift all risk to the grower.

Force Majeure

A minority of contracts contained force majeure clauses. A typical example of a force majeure clause is in the following terms.

> *Neither the grower nor the company shall be liable for any failure to perform their respective obligations under this agreement by reason of a force majeure event.*

A force majeure event can be natural or human and may include war, flood and natural disasters. The object of a force majeure clause is to identify in advance the situations in which the contract may come to an end and to factor this into the risk sharing spelt out in the agreement. Unfortunately, many drafters do not do this and instead use force majeure clauses as a catch all phrase. The example quoted above is in these terms and is therefore not commercially helpful. Such clauses should be avoided in all contractual arrangements.

Disputes

Only a minority of contracts contained disputes clauses and there was no standard as to how disputes were to be settled. Some referred to industry bodies such as the ASF's disputes resolution mechanism and one referred to the South Australian *Commercial Arbitration Act* 1986, variations of which exist in all states and territories.

What is to be done?

Despite the fact that contract growers surveyed expressed overall satisfaction with their contractual arrangements this legal analysis has identified some significant problems with growing contracts used in the pasture seeds industry. This does not mean that the project has concluded that contracts used in the industry are oppressive; rather we conclude that they are, on the whole, poorly drafted. In addition, we are concerned about the amount of variation in the growing contracts. Variation is not of itself a bad thing, after all some parties may like to negotiate their own personal agreements. However, in an industry where very few growers have the time or resources to get proper legal advice and where even the seed companies may not seek legal advice the variation and the lack of industry standards is of concern.

There are three main options for addressing these concerns.

Educate Growers and Seed Companies

The first option is that industry bodies such as the Australian Seed Federation and the Grains Council of Australia, or government organisations such as agriculture departments, run education programs for growers and companies regarding growing contracts. The problem with this is that industry bodies already take a leading role in educating members and, as our research has showed, growers are quite confident about their ability to negotiate contracts based on their own knowledge and expertise. The problem with the contracts is not on issues of quality and farm husbandry which growers know and which industry bodies are likely to focus on but rather with the very nature of the legal relationships established under the contracts. These are matters that only lawyers really think about (maybe because most people have more interesting things to do) and are unlikely to be adequately dealt with by simply providing more education.

Protective Legislation

In the United States, Federal and state laws have been introduced to protect contract producers. The US *Agricultural Fair Practices Act* 1968 permits poultry farmers to form associations to bargain for better prices. Other state laws directly regulate agricultural contracts and may require the contactor to allow the producer time to "cure" a problem before taking steps to terminate a contract; contribute to the costs of farm infrastructure in certain circumstances and use agreed disputes settlement mechanisms when problems arise. There is not enough research at the moment to suggest such legislation is necessary in Australia but industry stakeholders should be aware of this as a possible avenue should more serious problems be identified.

Standard Contract

The development of a standard contract by industry bodies would have many advantages. The development itself would entail a level of education for the industry. A standard contract would perform a protective role by ensuring that oppressive terms are not included in growing contracts and it could also deal with the finer legal points such as whether the parties are entering into a contract for service, a contract for services or for the sale of goods. It could ensure that each contract was suitable to use in all states and that the different state laws relating to conditions, warranties and exclusion clauses, for example, are incorporated into the agreement. Finally, it could reflect the interests of both growers and seed companies in ensuring that contract growing continues to serve contemporary marketing and distribution needs to the benefit of the industry as a whole.

Conclusion

In conclusion, the transformation of the pasture seeds industry which has taken place since plant breeder's rights were first introduced twenty years ago has been dramatic. It does not require an act of imagination to think about what the industry was like before the introduction of PBR but it may take an act of imagination to picture what it will be like in another twenty years. In this report we have been able to give some clues but in the final analysis, the future of the industry is in the hands of growers, breeders and marketers as they negotiate their changing relationships. So far, what has emerged has been partnerships of trust, or "joint ventures" as the US judge said, and we hope that this will continue.

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Attachment A

Managing IP in the Pasture Seeds Industry

A Rural Industries Research and Development Corporation Funded Project

Interviews with growers

Thank you for agreeing to participate in this interview regarding the management of intellectual property in the pasture seeds industry. The survey is part of a project funded by the Rural Industries Research and Development Corporation. Your name has been put forward as a grower who is experienced and knowledgeable about the industry.

We undertake to maintain confidentiality in regard to your responses and you will not be identified without your consent.

The survey

The survey will be conducted by telephone at a time to suit you and is expected to take about 40 minutes. If at any time you wish to terminate the interview or cease to participate in the project please feel free to do so. We respect your desires at all times.

The interview is in five parts.

- The first part asks for your views on the pasture seeds industry as a whole and your view on how the industry has changed over the past twenty years. We also ask whether you think the introduction of Plant Breeder's Rights has had any effect on the industry.

- The second part asks for you to explain the role of pasture seed growing in your farming practice: is it a major or minor part of your operation? It also asks you to describe your pasture seed growing activities: for example, whether you grow under contract; as part of a grower organization or independently, and why you choose to grow pasture seed in this way.

- The third part looks at pasture seed growing contracts: what are the good and bad things about pasture seed contracts; whether there are any clauses which you would like to change; whether you are allowed to keep or sell seeds grown under contract; and any problems you have had with contracts.

- The fourth part of the interview looks at pasture seed growing where there is no contract: how do you dispose of your seed? What are the benefits and disadvantages or independent seed growing?

- Finally; we look at relationships in the pasture seeds industry: who do you rely on for advice about contracts, seed quality and suitability; how do you resolve conflicts and whether infringement of plant breeder's rights is a problem in your area.

This list is more a prompt to the issues I'd like you to address, and I hope you will raise any related issues which are of interest to you.

Recording the Interview

With your permission we would like to record the interview to make sure we represent your views accurately. The recordings and transcripts of the recordings will be used only by the research team and you will not be identified. We would like to use quotes from the interview where desirable but will ensure that you cannot be identified by these quotes unless you give us specific permission to do so.

Project Researchers

- Dr Rocque Reynolds from the Faculty of Law of the University of Technology, Sydney is the Director and Principal Investigator and interviewer for the project. Rocque can be contacted at

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- Ms Cara Ghassemian is a researcher and interviewer for the project. Cara can be contacted

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Steering Committee

The Steering Committee for the project comprises well known people from all parts of the industry. They are

- Mr Tim Schultz who is the grower representative on the Grains Council of Australia Seeds Committee, a member of the RIRDC Pasture Seed Committee, and the current Chairman of the SAFF;

- Mr Hugh Roberts who is the NSW grower representative on the GCA Seeds Committee, a past member of the RIRDC Pasture Seeds Committee and a member of the Grower Board of the Australian Seeds Authority (ASA);

- Dr Ross Downes, the Director Research and Plant Breeding at Seed Genetics Australia;

- Professor Paul Martin, Director of the Centre for Agriculture and Law at University of New England.

Independent referee:

If you would like to contact an independent referee from the University of Technology, Sydney please feel free to contact

Professor Jill McKeough
Dean
Faculty of Law
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Complaints

If you have any complaints or reservations about any aspect of your participation in this research which you cannot resolve with the researchers, you may contact the University of Technology, Sydney Human Research Ethics Committee through the Research Ethics Officer on telephone (02) 9514 9615 or at Research.Ethics@uts.edu.au. Any complaint you make will be treated in confidence and investigated fully and you will be informed of the outcome.

PART 1 INTRODUCTION

Question 1

If you were asked by someone whether they should enter the pasture seeds industry what would you advise?

Question 2

Has the role of pasture seed growing changed on your farm or in your district over the past twenty years. How and when?

Would you consider the changes are generally good or a mixed blessing or problematic?

PART 2 THE NATURE OF YOUR BUSINESS

Question 3

Just to establish some details on your farming business, could you describe your farming practice and give some details including the following:

how and when you came to be growing pasture seed;

what your farming activities are in order of priority (including acreage if appropriate);

what proportion of your land is given to pasture seed growing; and

how important is your pasture seed growing as part of the business?

Question 4

Do you grow pasture seed under contract, independently or as part of a grower group or a mixture of these? Could you explain how you decide which way to grow pasture seed.

Question 5

How is the decision as to which pasture seed is grown made? Is the fact that a seed is registered under the *Plant Breeders' Rights Act* significant in making your decision? Is the fact that a seed is accredited significant?

PART 3 CONTRACT ISSUES

(Skip to PART 4 if you do not use contracts.)

Question 6

What are the benefits and disadvantages or growing pasture seed under contract ?

Question 7

If you grow under contract, do you grow under contract for one or more than one seed company?

If you grow under contract how do you decide which companies to deal with? (eg did they contact you or did you contact them? Do you rely on recommendations by other growers?)

Are there companies which you have decided not to deal with?

What makes a good company to deal with?

Question 8

Do contracts vary substantially from company to company?

If yes, what are the main areas of difference?

Question 9

How do you evaluate growing contracts? For example, do you get legal advice?

Do you generally negotiate the terms of the contract or just accept the terms offered by the seed company?

Question 10

What are the main problems with growing contracts, if any?

Question 11

Are payment terms set put clearly in the contract?

How is payment determined?

Do you feel the payments reflect the effort and costs?

Question 12

Is the quality of the seed provided guaranteed under your contract? What happens if the seed is not suitable for its stated purpose?

Question 13

What happens if there is a surplus of seed in any year?

Question 14

Is the seed company timely in deliveries and collection of seed and packaging?

Question 15

Do your contracts require you to sell all your seed back to the seed company?

If not, who may you sell seed to?

Are you allowed to keep some seed for your own use? If not would you like to?

Question 16

How fairly do you feel risk is shared between you and the seed company in your contract? Are there changes you would like to see in the contracts?

Question 17

Have you ever had a dispute with the seed company regarding your contract or the growing of pasture seeds under that contract? How was it resolved, if at all?

Is there a dispute or arbitration clause in your contact? Please describe any experiences you may have had using these clauses.

PART 4 NON CONTRACT GROWING

(Skip to Part 5 if you only grow pasture seed under contract)

Question 18

What are the benefits and disadvantages of growing pasture seed independently?

Question 19

How do you dispose of your pasture seed?

Do you keep seed for your own use? If not why not?

PART 5 RELATIONSHIPS WITHIN THE INDUSTRY

Question 20

If you need advice, who do you rely on for recommendations regarding seed choice, fertilization and other growing decisions? Are you happy with this?

Question 21

Do you think plant breeders' rights in pasture seeds are being infringed in your district or elsewhere?

Are you aware of what happens in the case of infringement?

How effective is this?

Question 22

Have you heard of the Australian Seed Federation Disputes Resolution Board?

Have you used it?

Would you consider using it if you did have a dispute?

If not why not?

PART 6 FINAL COMMENTS

Question 23

Is there any issue which we haven't raised which you would like to discuss?